Supreme Court of the United States

In the Matter of:

ROBERT KENNETH DEWEY

Petitioner

vs

REYNOLDS METALS COMPANY

Respondent

Docket No. 835

Place Washington, D.C.

Date April 21, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

ROBERT KENNETH DEWEY, Petitioner	)	
vs	)	No. 835
REYNOLDS METALS COMPANY, Respondent	)	

The above-entitled matter came on for argument at 10:17 o'clock a.m. on Wednesday, April 21, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Petitioner

LAWRENCE G. WALLACE, ESQ.
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On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Number 835: Dewey against the Reynolds Metals Company.

ORAL ARGUMENT (Continued) BY DONALD F. OOSTERHOUSE, ESQ. ON BEHALF OF PETITIONER

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

Mr. Dewey has been working at Reynolds Metals Company since the District Judge ordered him reinstated to the present date. The last time Sunday work was scheduled at that Reynolds Plant was in November of 1968.

The statute involved in this case, the Civil Rights of '64, Section 70381, deleting the material not bearing on religion would say: "It shall be an unlawful employment practice for an employer to discharge any individual because of such individual's religion.

The clause in the entire section, "or otherwise to discriminate against," I believe defines discharge for religion as discrimination. And thus the language is rather broad in prohibiting discharge for religion.

While religion is difficult to define precisely, I think there are at least two elements always present in that they are beliefs on the one hand, and conduct falling out of these beliefs on the other.

Q Well, does anyone challenge that issue here

to be --

A I don't think it's challenged, Your Honor. Except in the Chamber of Commerce brief, they would interpret the statute to cover and protect naked belief only, rather than conduct.

This Court has applied the Civil Rights Act. I am thinking particularly now of Griggs against Duke Power which was decided March 8th of this year. And the Court said that the face of the rule or even the uniform application of the rule is not an adequate matter for investigation. Quote:

"But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." This, of course, followed the Court's doctrine in the constitutional free exercise of religion also in such a case as Sherbert against Verner and in Barnett, where it is the effect of discrimination, rather than the face of the rule that counts.

Q Well,in the Grigs case wasn't that impact discussion, that is judging it by its impact and effect, tied in with the situation in which there has been a long history of discriminatory employment practices? Isn't that so?

A Yes, Mr. Chief Justice; this is correct. That case involved that kind of a fact situation.

Q But, do you claim any long history of discriminatory practices against religious beliefs in this case?

A No; we do not. But we do claim that the language which this Court used in Griggs is broad enough to cover more than the bare fact situation in that case; that the approach to this act is to look at consequences of discrimination.

Reynolds' defense that this rule of required overtime applied uniformly to all people, whether they had religious objections to working on Sunday or not, we claim, therefore, is not an adequate defense because the effect of this rule is to put a person with Dewey's religious beliefs to a choice that no other employee is put to, and that is: of either sacrificing his job or sacrificing his religious convictions.

It was precisely this kind of a conflict which this Court disapproved of in Sherbert against Verner even though that was under the constitution, I think, the principle of interpretation is applicable to the conflict between religion and employment under the Civil Rights Act.

The Commission charged with enforcement of this act has adopted regulations and it has, by the regulations, adopted an intermediate interpretation of the act. As I indicated before, the Chamber of Commerce brief would have us apply the protection of the Civil Rights Act only to belief, not to conduct flowing from that belief at all.

The language of the statute itself is very broad

in prohibiting discharge because of religion without any reference to the degree of hardship which might result. from continuing the employment of a person. The regulations adopted in its reinterpretation, saying that a person may be discharged because of religion, if to do otherwise would create undue hardship upon an employer. The regulations place the burden of proof of showing this undue hardship also upon the employer.

In this case the accommodation which is required by the regulation could have been easily accomplished and I think that the employer here has completely failed in his burden of proof to show that to accommodate would have created undue hardship. The evidence indicates that there were, on each of the Sundays involved, several people in Dewey's classification who were not assigned to work. The evidence shows that Mr. Dewey was the only person in this classification with the religious convictions against Sunday work.

The evidence also shows that there were two persons outside of the classification who were qualified; that in fact on one of the three Sundays involved Reynolds did ask one of these persons outside of the classification to work and he did work. And there were no great problems according to the facts we have before this Court, resulting from Reynolds doing that.

We submit that on the basis of the evidence presented there is nothing to show that REynolds was unable to

accommodate by getting volunteers to take Dewey's place on the three Sundays in question. And that's accommodation even short of using their compulsory overtime clause. I don't think that we, on the evidence, even have to get into the compulsory overtime clause. They could have done it without directing an employee to work; they could have done it by asking another employee to work.

However, even use of the compulsory overtime clause had been required I think this is still in the area of reasonable accommodation and does not show undue hardship.

Reynolds claims that at one point, some ten years prior to the three Sundays which Dewey was involved they had trouble in obtaining enough people to do overtime work. This was before their contract contained any compulsory overtime clause, so I don't think that that constitutes any evidence whatsoever of undue hardship in Dewey's situation.

Their other claim of undue hardship is that to accommodate Dewey would completely negate their compulsory overtime clause and I submit that this, too, is not correct. If this statute is as we interpret it, it will supercede the provisions of the contract only to the very narrow extent necessary to comply with the act.

If the law be that accommodations must be made on the basis of religious belief this does not mean, as Reynolds argues, that accommodation has to be made for every personal

reason. The statute only lists specific classifications.

Thank you.

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

Mr. Wallace.

ORAL ARGUMENT BY LAWRENCE G. WALLACE,

OFFICE OF THE SOLICITOR GENERAL ON

BEHALF OF THE UNITED STATES AS AMICUS CURIAE

Mr. Wallace. Mr. Chief Justice and may it please the Court;

This is the third case under Title VII of the 1964 Civil Rights Act to be argued in this Court. The first two cases were decided earlier this term. In all three cases the complaint had been acted upon by the Equal Employment Opportunity Commission prior to the filing of the suit as the law requires. But, because of statutory differences between enforcement powers of that commission and the powers of other Federal agencies, such as the National Labor Relations Board and the Interstate Commerce Commission, the Equal Employment Opportunity Commission was not a party to any of these three suits in the Federal Courts to enforce Title VII.

Since we believe that this Court's decision in these case are in many ways as vital to the work and the responsibilities of the Equal Employment Opportunity Commission as this Court's decisions under the statutes other agencies

administer or to those agencies and since the Attorney General also has important statutory responsibilities for the enforcement of Title VII the United States filed an amicus brief in each of the three cases and asked to participate in the oral argument in each of them. And in two of the three cases, including the present one, the Court granted our request to participate in the arguments.

Now, the District Court's judgment in this case in favor of the Petitioner wasreversed by the Court of Appeals on two grounds, and we believe that the Court of Appeals was wrong on both grounds and that the District Court's judgment should be reinstated.

The first ground of reversal was that arbitration under the collective agreement foreclosed suit in the courts under Title VII. This, however, is of great concern to us because of the severe impact that it had on all of the rights against discrimination conferred by Title VII.

Q Do you suggest that it's undesirable to have rights under the act disposed of by private arbitration; that is by factual arbitration?

A Congress specified a different method for enforcing the rights under the act.

Q Did it exclude private arbitration?

A Not in terms, Your Honor.

Q Does any statute ever exclude arbitration

unless it does so by the most explicit terms? Has it ever been so held?

A There has been no holding in this Court to my knowledge to that effect, but we think thelegislative history indicates that Congress conferred on an individual an ultimate right to vindication of the rights against discrimination conferred under Title VII by their own lawsuits in the Federal Courts, rather than to representation by their union against whom Title VII was also directed and was also, in Congress's view been, in some instances, guilty of the kind of discrimination that Congress wanted to eliminate in the arbitration process.

Q Well, putting aside for a moment, even though not setting aside as unimportant the intervention of the union here, or in such cases. Is it not true that the courts generally for a long time, including this Court, in opinions, have indicated broad approval of disposition of conflicts by arbitration?

A Well, we believe our position is entirely compatible with that approval because if the decision below were to prevail, if an employee could invoke the arbitration remedy only at the cost of sacrificing some of his Title VII rights, he would be discouraged from invoking the arbitration remedy.

Q I thought your point of the laws was that

this arbitration did not and did not purport to settle any results under the act, but only to settle the rights of the parties under the collective bargaining agreement.

A Well, that is our point in this case, Mr. Justice Stewart. That is entirely true. We felt that in our brief we also should address the broader issue and say what our position is. That issue need not be passed upon by this Court, but we wanted our position known because sometimes the Court's opinions do speak beyond the narrow confines of the case.

In this case there is no question but what the arbitrator didnot purport to pass on the Title VII issue and he had no authority under the collective agreement to pass on anything but a claim under the agreement. The agreement did not contain any provision relating to religious discrimination. It did have a provision relating to sex discrimination and that is the only anti-discrimination provision in the agreement.

Q But it did have a provision which said no one would be excused from overtime except for good cause or some provision like that --

A Well, there were provisions concerning overtime. The arbitrator ruled that the employer's position in this case was supported by those provisions and the Title VII suit in no way questions that the decision of the

as to the meaning of the collective agreement.

There is a statutory right at issue that's wholly independent of the collective agreement here, and if the collective agreement hadn't existed at all the statutory issue would be exactly the same, in our view, that Congress conferred a right on individuals. It doesn't depend on whether they had a union or whether the union entered into a collective agreement with their employer. That's the point in this case.

We have in our brief, elaborated the fact that under-- what happened, we recognize, at least in the restatement of the judgment, as elementary principles of the law of judgment, are directly contrary to the position which the Court of Appeals took in this case: we have cited the relevant comments and illustrations from the restatement in our brief, and as we have pointed out, two other Courts of Appeals, those of the Fifth and Seventh Circuits, have taken the opposite view about the relation between arbitration in Title VII in circumstances essentially similar to the circumstances here.

Q Earlier this term we had a case involving a very ancient statute, 18th Century or very early 19th Century, affecting --

A The Arguelles case.

Q -- affecting seamen?

A Yes.

Q And a collective bargining agreement to which that seaman's union and his employer were parties?

A Yes, Mr. Justice.

Q Do you --

A We discussed that case inour brief and as we point out in a footnote in our brief, we don't think the present case presents the difficulty that divided the Court in the Arguelles case. Even in that case --

Q How do you spell that case?

A The Arguelles case; A-r-g-u-e-l-l-e-s. That, as I recall, is the second, rather than the first party. It's on page 19 of our brief in Footnote Number 6: United SStates Bulk Carriers, Incorporated, against Arguelles.

As we pointed out in that case that the dissenting justices emphasized the fact that the statutory penalty in those circumstances depended, according to Mr. Justice White's opinion, entirely on interpretation and application of the bargaining agreement. And we are not involved with that kind of right at all here. And for other reasons that we discuss in the course of the brief, we don't think that the difficulties of that case are presented here.

Here all that the arbitrator decided was that the discharge of Petitioner did not violate the terms of the collective bargaining agreement, containing no anti-discrimination provision relevant here.

In other words, under the Court of Appeals' holding the Petitioner is entitled to virtually nothing more than he would have if Title VII had never been enacted; a decision by the arbitrator about whether the collective bargaining agreement afforded him protection or not. I say "virtually nothing more," because he did have the benefit of conciliation efforts on this behalf by the Equal Employment Opportunity Commission, but those efforts are likely to be of little effect in a situation in which the possibility of enforcement of Title VII would be foreclosed, because of the grievance procedure.

And we believe, in enacting Title VII the Congress did accomplish more than this, otherwise a large category of of employees covered by collective bargaining agreements would be virtually denied the benefits of Title VII, which to us, is a very important matter.

Although the relationship between arbitration of Title VII rights was not explicitly discussed in the legislative history of Title VII, Congress was, of course, aware in 1964 of the widespread use of arbitration under collective agreements, and this is another distinction of the Arguelles case, where we are dealing with an old statute. And yet the whole design reflected in Title VII was to confer an ultimate individual right to sue that would not displace other rights, but would be in addition to; we elaborate that in our brief.

And this is all taken into account in the decisions of the Fifth and Seventh Circuits which have held that the Selection of Rights Doctrine is inappropriate here. Those decisions I cited on page 16 of our brief.

And their holding is that arbitration under the collective agreement and remedies under Title VII may each be separately pursued to judgment so long as double recovery is not allowed, which we think is the proper approach. It may be coincidental that the same remedy is appropriate if rights under both the collective agreement and Title VII have been violated. In this case no right under the Collective Agreement was violated by the employer, so that issue doesn't even arise.

There are important differences between arbitration and the Title VII rights which we think justify this view and one is the fact previously mentioned that the submission of the grievance to the arbitrator is controlled by the union where the Congress in Title VII conferred the right to sue on the individual complainant. And it is significant in this context that Congress found it appropriate to afford protection under Title VII against discrimination by the unions as well as by employers and thought that this was a comparable problem and although in this case no claim of bad faith in the union's representation is made, it is noteworthy that in the grievance proceeding before the arbitrator the employer was represented

by a lawyer; the union was not, and the employer filed a post-hearing brief and the union did not.

We think it's significant that Congress gave the complainant the right to control his own litigation under Title VII.

Another important difference, and I think a crucially important difference is that the scope of judicial review that arbitrators award is very limited and this is appropriate, because arbitrators are applying the disparate provisions of private agreements. But in Title VII Congress conferred a statutory right on individuals and provided for its enforcement through the normal judicial processes which assured greater uniformity in the interpretation and application of that right and there is a corresponding public interest in assuring that access to the courts is available because the availability of that access encourages compliance with the act as the courts have interpreted it.

Q Mr. Wallace, didn't Petitioner also seek redress as under the state statute, the Michigan Civil Rights Law?

A That is a prerequisite here, because --

Q -- to his invoking his --

A To his invoking Title VII. That is correct, and the Michigan Civil Rights Commission determined that he did not have a right under the Michigan Law and then he could

proceed with the Equal Employment Opportunity Commission and bring this suit.

Q That was a necessary condition of proceeding under the --

A Under the Federal Statute; thatis correct.

Well, if I may I will turn to the merits of the suit, since we believe that this Court should also reach the merits, and the Court of Appeals, as a second ground for its reversal of the District Court's judgment, also ruled against the Petitioner on the merits.

And our starting point on the merits is this Court's recent decision in Griggs against Duke Power Company, which held that where employment practices are neutral on their face, but discriminatory in their effect, the employerhas the burden of showing that they are required by business necessity. This has long been the Equal Employment Opportunity Commission's approach to the act.

It is true that in the Griggs case, as the Chief Justice has pointed out, that with the background of discrimination by the employer, this is relevant to the right of the Attorney General to bring a suit under Title VII because of the pattern of practice of discrimination, perhaps, but it doesn't seem to us to make a difference to Mr. Dewey.

Q Didn't the Griggs opinion link those two items rather intimately together?

A In one portion of the opinion; yes, Your Honor. But, Congress didn't require the individual to show a pattern of practice of discrimination. Congress said the individual has a right not to be discriminated against in his employment because of his religion regardless of whether anyone else is being discriminated against by the employer and indeed, it doesn't really comfort Mr. Dewey very much if he loses his job to know that the employer is discriminating against anyone else.

Q Well, that's a different question, is it not, from conditioning this, what might be called "an impact test" or an impact inquiry to the existence of prior discrimination generally?

A Well, it's -- I don't think that there is a significant difference there. No employer today, certainly no institutional employer of the type largely covered by Title VII is going to say that it won't hire a member of the Faith Reformed Church or that it's going to fire people because they belong to the Faith REformed Church. The religious discrimination protection afforded by Congress would become a virtual nullity if it were limited only to discriminations on their face because of religion.

And it seems to us that the religious guarantee that Congress had in mind, the protection of religious freedom and diversity in this country, necessarily must extend beyond

that, as this Court's opinions have recognized time and again, whether you want to cite Sherbert against Verner or the West Virginia Board of Education against Barnett, Zorak against Clausen --

Q Those are all constitutional cases, First Amendment cases? This is not that --

A Yes. This is not that; this is a statutory right that Congress has conferred which we think is very comparable to the constitutional right against governmental action. It may not be identical but we don't think there is any warrant for reading it so drastically more narrowly than this Court has afforded in protections of individuals against governmental action.

Q Well, the question is: what does this statute mean? And if it does mean that Congress, by statute, is giving employees as against their employers all the rights that all of us have against Government under the First Amendment, then what you say is obviously correct. But that's the issue in the case; isn't it?

A Well, we even go so far as to say all of the rights --

Q But the issue is: what does this statute mean?

A Well --

Q -- as related to these facts.

A Well, one of the best approaches to that is to look at the guidelines adopted by the agency responsible for enforcement of the statute. As this Court said in Griggs, those guidelines are entitled to great deference --

Q Which is that; the earlier one or the later one?

A Well, we don't think that makes a material difference in this case, as we pointed out in our brief. There is really no substantial difference in the governing portion other than in this case. The only difference of substance between the earlier ones and the later ones is that the earlier ones gave a number of examples of the application, none of which fit the precise facts and so the general standards in the earlier one in our view is the governing standard, and that is, essentially the same as the general standard applied by the District Court in relying on the 1967 guidelines. It's set forth in the 1967 guideline on page 41, Appendix B of our brief, and the Commission there referred to obligation on the part of the employer to accommodate to the reasonable religious needs of employees so long as this can be done without serious inconvenience to the conduct of the business, a virtually identical formulation to the 1967 formulation.

This approach, which is very similar to the Griggs approach, seems to us entirely appropriate here. Its application in this case is indeed much less disruptive of the

employer's preferences than was the application of the general business necessity standards in the Griggs case, because there the employer was required to give up its high school diploma and testing qualifications altogether for jobs for which they were not shown to be job-related and here the Respondent is free to retain his overtime substitute policy just as it has been applying it and all it need do is make a simple accommodation to the religious needs of this employee by arranging itself for a voluntary substitute for the Petitioner, rather than insisting that the Petitioner make the arrangement, which is a very minor intrusion, it seems to us on the employer's preferences.

The records show that at least four possible substitutes were available on each of the Sundays in question and the Respondent did not show that it could not arrange for one of these men to work voluntarily in Petitioner's place. It seems to us it was the Respondent's burden to make a showing, but, as this Court held in Griggs: The stipulated facts -- this is on page 42 of the Appendix -- that the Petitioner had managed to get a voluntary substitute on at least five previous Sundays, strongly suggests that the employer could similarly have made satisfactory arrangements for the other three Sundays after the Petitioner decided on further reflection that his religion forbade him to make the arrangements. He had managed on five Sundays to get a voluntary replacement

without any power or compulsion over these individuals.

Q It was always the same one, wasn't it, Mr. Wallace?

A I think that is right. I believe that man was available also on two of the three other Sundays.

Q Well, you would make the same argument, wouldn't you, if the other employees said: "No; we don't want to work on Sunday; let's take turns at it."

A We would make the same argument, but the Court need not reach it in this case. It seems -- this case seems like a rather easy one, but I don't want to exaggerate. But, we don't have to go that far in this case.

Q But your argument does.

A Our argument does in the brief. We feel that an amicus brief of this kind --

Q If the other -- can't be sustained, how about this case?

A Well, I think that's inherent in my saying the Court need not reach the broader ground. I think this kind of a minor adjustment by the employer is certainly justifiable under the act. If the employer had made a showing that he could not get a voluntary replacement then there would be more substance, it seems to us, in his argument that the seniority exception has a bearing on this case.

Q Would you be here making the argument if the

question was work on Saturday on a regular shift?

A That would depend on the evidence in the case and what showing had been made about the needs of the employer's business.

Q Well, if he's always working a six-day week and --

A And what kind of problem he would have if this man would refuse and were excused from the Saturday work perhaps could work compensatorily the other times. It would depend on his business situation. That's the Commission's approach to the act and we think the proper approach.

Q Mr. Wallace, if someone suggested that your argument for this act and the agency's construction tends to create a governmental preference in favor of religious people which it does not give to nonreligious people would you say that was an improper inference?

A Well, that argument is made in this case; indeed the argument was made that the application of the act would violate the establishment clause. It seems to us to be almost exactly the same preference that this Court held in Sherbert against Verner which required in the circumstances of that case under the free exercise clause. It seems a little strange to us to be making the argument so much the other way with that case and the Virginia Board of Education against Barnette and Zorack against Clausen on the books.

I think actually the case that's most closely in point are the Sunday closing law cases decided by this Court in the 1960 term. In one of those cases, Braunfeld against Brown, the Court held that while an exemption for Sabbatarians is not constitutionally required, it is constitutionally permissible and indeed, the opinion of the Court said that may well be the wiser way of handling the problem of Sunday closing laws, even though it could be argued that that gives Sabbatarians the advantage to compete on Saturdays in a way that others can't compete.

There is also an argument advanced here by the Respondent that even if the District Court is otherwise correct, it should not have awarded that case because the Respondent relied in his case on the collective bargaining agreement and the Respondent there cites a District Court decision in Oregon in which the District Judge did not award that -- because the Respondent there had relied on a state statute limiting the weights that can be lifted by women.

We don't think -- in the first place we do not endorse the decision of the District Court in Oregon, but we don't think that it's really apposite here. The Respondent here was not in any dilemma comparable to that of the employer in Oregon arguably was in, where he felt he would be violating the requirement of state law if he acceded to the request of his employee.

Here, although the collective bargaining agreement, the arbitrator held, empowered the Respondent to fire Dewey, it certainly did not require the Respondent to fire Dewey in these circumstances and the Respondent could hardly claim it felt its obligations under the agreements to the union required that it fired Dewey, since the union took exactly the opposite position throughout the grievance proceeding that the employer should not fire Dewey because of thisproblem.

And so in sum we argue that the District Court probably applied the act here in accordance with the Congressional intent to protect religious freedom and diversity in this country from unnecessary rigidities in the employment practices of institutional employers, such as the Respondent and accordingly we ask that the District Court's judgment be reinstated.

MR. CHIEF JUSTICE BURGER: Mr. Coughlin.

ORAL ARGUMENT BY WILLIAM A. COUGHLIN, JR., ESQ.

ON BEHALF OF RESPONDENT

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

This is an action for money damages and reinstatement of position brought under Title VII of the Civil Rights Act of '64. Respondent REynolds Metals Company discharged Petitioner Dewey because he violated the provisions of the collective bargaining agreement entered into by his union and

employer: Reynolds Metals Company.

The violation consisted of his refusal to work on three overtime Sunday assignments when assigned pursuant to the collective bargaining agreement and his refusal on each of the Sundays in question to arrange for a replacement. This was an ultimate procedure which had been extensively used by all employees, including Petitioner Dewey.

If you will bear with me, and we feel strongly about this, there are six separate grounds which establish in this matter that the Respondent did not violate the Civil Rights Act of 1964 and I would like to briefly outline them and then go to them.

One: In this case the discharge did not violate the Civil Rights Act in any way.

Two: The act itself, the Civil Rights Act itself, contains a number of exemptions, exceptions and limitations. Reynolds falls within a particular exception.

Three: The Government, through the EEOC, has stated that the prohibition against discrimination for religious reasons, includes an obligation to accommodate religious scruples. Respondent argues there is no legal basis under this act for accommodation and the enforcement of accommodation by the EEOC may well be a violation of the Establishment Clause of the First Amendment.

Four: Even if accommodation is required as a part

of the prohibition against discrimination the EEOC has issued guidelines which in two instances in 1966 ratified the conduct of Reynolds Metals Company, and in the third part of the '66 guidelines we accommodate, in the words of that act.

Five: Because of the wording of the act itself which is called the remedial section thereof, requiring intentional violation, which Mr. Wallace just referred to; we don't think there is any right under the law to reinstatement or back pay. And finally, under the

And finally, under the election of remedies theory the case shouldn't even be here, as the Sixth Circuit Court of Appeals indicated. But I would say that the Sixth Circuit Court of Appeals in ruling on this case, went to the merits first and then to the procedure and so it's well done in our estimation in this point that the whole matter can be qualified because the individual involved, the Petitioner, does not suffer on a procedural basis. You have before you both the merits and the procedure.

I would like to go to the first of our bases. We don't think that under any interpretation of the Civil Rights Act, whether you go to discrimination by intent or discrimination by effect, that there is an violation. The objective of the act, as was said in the Griggs case, is to achieve equal employment opportunity. This objective has to be achieved through prohibiting selective forms of employment discrimination

involving religion, race, color, et cetera.

What is discrimination? It isn't defined in the law. The classical definition has to do, in a -- of making a distinction or making a difference in treatment between one employer and another based on religion in this particular act.

The more important question, I suppose, is what kind of discrimination is prohibited? What are we talking about? Are we talking about discrimination by intent? Are we talking about discrimination by effect? I would submit to you that if you look at the legislation and I know you gentlemen are much more familiar with it than I, but nevertheless I submit that if you look at the act itself -- for instance, 703(h) in this particular act. It says an employer may apply different terms and conditions to an employee and then the magic ring which, if it is, provided if it is based on a seniority system: "provided there is no intention to discriminate."

Going to 706(g): The remedial relief under this act as envisaged by Congress,was to be applied, reinstatement and back pay and injunctive action if the employer has intentionally engaged in unlawful employment. Both sections seem directed at discrimination by intent.

Let me quote to you if you will, and it's very hard in the legislative debates, because of the way that the act was passed, and the format that went through the SEnate and

the House, but at the time that it was passed, then Senator Humphrey had this to say, and he was talking about Section 706(g), and he said in part: 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change since the title bars only discrimination because of race, color, religion, sex or national origin, it would seem already to require intent, and thus the proposed change does not involve any substantive change in the title.

The express requirement of intent is designed to make it wholly clear that inadvertent of accidental discrimination will not violate the Title or result in injury of court orders. It means simply that the Respondent must have intended to discriminate.

Q Where does that appear in the briefs or appendix. Could you tell me?

A I am unable to say that it is in the briefs or the Appendix. It is in a Michigan Law Review article that is as yet unpublished. Senator Humphrey -- let me correct myself. It may be --

Q Don't interrupt your argument now, but give me the legislative reference so that sometime after your argument --

A The legislative reference would be 110 Congressional Record, 5,723 and going onto the next page, 724.

1964.

A further support for this definition of intent is found in the views expressed by Senators Joseph Clark and Clifford Case, the floor managers of the Civil Rights Act. In their interpretive memorandum concerning Title VII they noted inter alia: "It has been suggested that the concept of discrimination is vague. In fact, it is clear and simple and it has no hidden means. To discriminate is to make a distinction, to make a difference in treatment or favor and those distinctions are differences in treatment or favor which are prohibited by 704 which was later changed to 703 when the act came out, of those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin.

"Any other criteria or qualification for employment is not affected by this title." The reference is 110 Congressional Record, 7213.

I submit that with this background I would like to take you through the actual facts of the case. Prior to 1960 this plant located in the outskirts of Grand Rapids, Michigan, found it impossible, not difficult, as the District Judge said, but as the stipulation says, "found it impossible to work in overtime situations." This was because of the fact that overtime under the UAW collective bargaining agreement was based on a voluntary overtime proposition as far as

employees were concerned, and the plant found it impossible to operate on overtime situations.

The company negotiated with the UAW in 1960 as the bargaining agent and achieved a compulsory work clause which provides for the allocation of overtime work equally among a classification on a voluntary basis. And let me explain to you briefly how that's done. In that situation when there is an overtime situation, according to union contract you equalize -- you go to the classification and you at first, with an attempt to equalize the overtime opportunities, go to the low man in the classification, low man on overtime, as far as overtime is concerned, his past experience. He is given the first opportunity and then the next man and the next man, based on his, where they are on the overtime, regardless of seniority at the moment.

If enough people volunteer then there is no reason to go any further. If you don't have enough people then you go to the low man in the classification by seniority and you compel him until you have enough people to work the overtime. This compulsory overtime was necessary in this plant to enable the company to work in overtime situations when business demanded it. This is, in a sense, a job shop. They do not produce for storage; they produce on the basis of orders and as the orders to accommodate your customers to compete with Alcoa and Kaiser. This is the necessity that arises at the

time; this was the business necessity to enable the plant to work on six or seven days and also work in a normal overtime situation.

Beyond that, the substitute program was instituted in 1965. By the "substitute program," we mean that if an individual wanted a day off, for whatever reason, be it religion or otherwise, he could have the day off. But, under the compulsovy overtime the responsibility is his to seek out the substitute. This system of inauguration was initiated in 1965, long before the EEOC suggested accommodation by guidelines.

In 1964, '65 and '66 there was an increase in production to the point where in 1966 the company worked substantial overtime on 24 out of 37 Sundays. How would we apply this compulsory work clause in the substitute system in the contract? The company, as the arbitration indicates, in its own course agreed to this point. The company disciplined all who refused to work, whether it was because of Sunday, because of a problem on Sunday or because of any other day. There were 11 disciplinary penalty cases involving religion prior to Mr. Dewey's discharge. There were a host of other disciplinary actions for any reason on any day on overtime.

What happened to Mr. Dewey? He worked overtime prior to 1961, but in 1960 it was established, as I have indicated, the compulsory work clause.

Q You said he worked overtime. Did he work overtime on Sunday?

A He worked overtime on Sundays prior to 1960. That will be found in the Appendix at 77-A. In other words, and I think, Mr. Chief Justice, the reasoning for that is, as you will see, is that his present, or his -- and I don't want to say "present" or his religious preference did not become apparent until 1961. So he had no scruple prior to 1961.

Q Does that affect the merits?

A I don't think so, sir.

Q That would not be remarkable for someone to change his views on a religious issue; would it?

A It would not be remarkable. The question beyond that -- I agree it would not be. The question beyond that is how much protection should be given under the interpretation of the act? I agree there is no reason that we would say thatone could not be converted to whatever faith one wanted, regardless of the time of life.

In 1965, I believe in November of '65, Mr. Dewey refused a work assignment under the collective bargaining agreement. At that point he was not disciplined. In 1966, as the record indicates, at 42-A, Stipulation 15, Mr. Dewey in 1966 used the substitute system on five occasions and then finally in mid-1966 on August 28th, to be specific, Mr. Dewey

refused to work and refused to get a substitute. On September 4th the same practice; on September 11th the same practice.

For each of these situations Mr. Dewey was disciplined. In the first instance he was disciplined; on the second he was disciplined again in the form of a three-day layoff and on the third day he was discharged for refusing to work or to get a substitute.

In conclusion on that point: a _____ of the replacement system was nondiscriminatory and was applied uniformly to all employees by the seniority system of the collective bargaining agreement. Dewey was never assigned or denied overtime because of his religion. REynolds did not discriminate against Dewey, rather afforded him and everybody else equal employment opportunity.

The Sixth Circuit says very definitely and says it as well as I can say it; that the collective bargaining, there was nothing discriminatory in the collective bargaining agreement itself, nor in its application. It was a fair and equitable method of distributing a heavy workload among all the employees without discrimination against anyone.

Griggs doesn't require, in our opinion, the application of a different rule. I submit to you that the rule, as far as we can see, is that we are not -- discrimination by intention and Griggs doesn't require, in our opinion,

the application of the different rule.

The Court said in Griggs, with all due deference to the Court, our understanding of it, that practices neutral on their face, neutral in intent, uniformly applied, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices.

In this situation before this Court there are no prior discriminatory practices. It was a regular policy, neutral on its face, nondiscriminatory in intent in either ~~in~~ in application. There can be nothing more clear than the policy that was used in this particular situation.

Q How long had Mr. Dewey been with the company?

A Mr. Dewey has been with the company since approximately 1951.

Q Twenty years?

A Yes, sir. Twenty years -- let me say 20 years until 1971. At the time of the discharge in 1966 he had been there 15 years, sir. He acquired his religious preference, his religious scruple in 1961.

Q What religious scruple was that?

A The religious scruple was that it was against the tenets of his religion as he envisaged his religion, to work on Sundays.

Q Or to ask anybody else to.

A Well, an interesting point: that aspect of his case did not develop until 1965.

Q That's his present --

A The present tenets -- he can't work as a tenet of his religion, and secondly, he can't ask somebody else. Now, I don't want to go into the thing --

Q Well, we have to accept that, don't we?

A Pardon?

Q We have to accept that.

A I have no quarrel with the religion, nor do I really want to engage the Court as to what is the definition of religion.

Q How many times during this period have you had trouble with him?

A With Mr. Dewey?

Q During the time he worked.

A During the time he worked --

Q How many days did you have the dispute over?

A How many days did we have the dispute over? We had a dispute with him on one particular Sunday in 1965; on three particular days in 1966.

Q Mr. Coughlin, I take it there is no question other wise about the integrity of his work. He was a

satisfactory worker?

A Yes, sir.

Q And then what did the company accomplish by firing him completely? Did it avoid the disruption of his not appearing for overtime?

A Well, let me put it this way: your question suggests why would not the company get a substitute.

Q I'm not really asking that --

A All right. I will answer what you put to me. The discharge was, in our opinion, mandatory as far as the company was concerned for the uniform administration of the collective bargaining agreement in that this contract had -- the contract itself, there are also in the record shop rules and the shop rules call for certain penalties under certain circumstances with ability of the company to be more lenient if they choose.

But, in answering Mr. Justice Blackmun, to your question: if we back off this situation we have to back off every religious situation and we know not where to go as far as how deep that exception is. If we release Mr. Dewey or accept mMr. Dewey, our theory is that we lose our rule, our compulsory work rule, and under those circumstances our last days are worse than our first in the sense that we are back to a pre-1960 situation where we will not be able to work overtime when the company has the necessity.

Q You mean on Sunday?

A Or Saturday. In other words, this rule of compulsory overtime applies to all overtime situations, and if we except as to one individual, whether it be Sunday, whether it be Saturday or whether it be any given day, a normal day, then we can't fire uniformly. We will have great resistance -- in other words, the essence of the collective bargaining agreement -- is uniformity of application. We treat Dewey just the same as we treat everybody else and if you make exceptions for Dewey, Mr. Justice Black, we must make exceptions for everybody else under the labor agreement or else you have disparate treatment under the labor agreement.

Q Where is Mr. Dewey now?

A Mr. Dewey was put back to work in the plant by virtue of an injunction of the District Judge for the --

Q Have there been any disciplinary problems since he got back?

A Yes, sir --

Q Well, why if he stays there will you have all these things you are talking about?

A You mean if he stays there -- we're under injunction at the present time. If he stays there he will be obliged to take his turn at overtime just as every single person in the plant --

Q Is he doing that now?

A No, sir. We are under injunction not to require it and --

Q And the plant is running just normally, just as if he had been --

A Yes, sir; in answer to your specific question.

Q Well, this was put in here in an effort to settle this controversy so that you wouldn't have to have all of these constant losses; wasn't it?

A The injunction, sir?

Q The contract that you had.

A The essence of our collective bargaining contract is to treat everybody the same and to avoid disparate treatment; that's the essence of it --

Q Wasn't it intended to settle this particular problem?

A Yes, sir.

Q Why hasn't it? What's wrong with it?

A Well --

Q What kind of changes do you say would have to be made to get it settled where it wouldn't have to be coming all the way up to us?

A My answer is that under our opinion the matter was settled when it went to the arbitration and in that situation the arbitrator held for the company as against

Mr. Dewey and that was a final resolution to the ordinary contract situation that would be --

Q That's what has happened, isn't it?

A Well, if that's final, except that under the way that the Civil Rights Act is applied for the moment, an employee has two bites of the apple and this is the -- and this reminds me to a certain extent of two small boys who say, "Let's throw two out of three," and they flip. And then the loser says "Let's throw three out of five." In this situation it's heads the employee wins and tails: let's flip again, because if he loses his arbitration then he goes to the Civil Rights Commission.

Q It sounds to me like that illustration is pretty good with reference to the fight at all: "Heads I win and tails you lose."

How would you change that contract to get around that?

A Well, I'd like to say, Mr. Justice Black, that I don't think the contract needs changing and I don't think that the law says we have to do it.

Q Suppose the law has said it and we say it; how would you get around it then?

A I would have to say to you that at that point we would have to attempt to negotiate with the union to make certain exceptions to that policy and at that point I

don't know what the consequences of the resolution of the problem would be. In other words, can you get the union to accept for a part of the people, except overtime requirements on certain days for part of its people. I guess the easy answer to that is everybody would turn religious and then the exception would be swallowed by the rule.

Q If the contracts were amended hypothetically, to provide for final binding and unreviewable arbitration of all issues, including claims under the Civil Rights Act, would that be the end of the problem? Your friend, in opposition, with a question something like that, said that the union cannot bargain away the employees rights under the Civil Rights Act. What would you have to say about that?

A I am of the opinion that you can't bargain away a right, but let me say that in this case, and we are going to the election of rights theory, the right in the contract and the right under Civil Rights, the right to a grievance, was discrimination against the individual. The right in Title VII that's alleged is discrimination against the individual.

The remedy to complete reinstatement and back pay under the arbitration, the remedy under Title VII of reinstatement and back pay, and my answeris that I think that in this situation that the rights are the same and there are two forms that are available, but you can't go both ways.

And, in answer to your question I think you could make a clause of that sort possibly, but I suppose it might not be applicable in every case. I'm not positive. In this particular case, Mr. Chief Justice, the rights and remedies are the same.

The Hutchins case says that there are two causes of actionhere and you can see that and look at the distinction between the rights and remedies. Hutchins and Bowe both say that. An analysis doesn't bear them out in this case and there is one cause of action or one pleading in this case and really we don't quarrel with whichever way you go, whether you go the arbitration way or whether you go the Civil Rights litigation way, but -- and go both at the same time if you wish, but when you get a judgment that -- and in that regard -- in that regard, if this Court should hold the concurrent remedy moot, an interesting thing will come to pass, I believe.

This: that the vitality of arbitration is its finality. In this particular situation if you espouse the concurrent rule every employee will write his grievance in the language of the contract in a disciplinary case. "I was disciplined; I didn't get a promotion; I didn't get my vacation on time; you disciplined me or you took me out of the line of seniority." Then he will add one other rule in every grievance, and that rule will limit the age, and we all have it in one way or another, in the sense we all have it

one way or another; religion: generally we have it. Color: we have it one way or the other; and so in that case each individual will add one rule and it doesn't have to be too pertinent either, then the matter will be submitted to arbitration. If the employee wins that's the end of the case. If the employee loses, Mr. Chief Justice, at that point he says: "That was too bad; that was a bad ride. Now I will go on to the second of my two rights," and go back to the litigation route by statute, under Title VII.

And I say to you that as far as union contracts are concerned, that I can foresee very quickly that vitality of that arbitration as a final and binding rule is gone. And the Government says in its brief, at a certain juncture: Now look, what we really mean in this case is that you as an employer get a group to uphold for arbitration. There is a no-strike clause. I grant you that, but there is also a significant thing that when you get arbitration as a final step it won't be final any more, because these things are the basic essences of life, when you take those things that are in the Civil Rights Act.

Q Will you answer this: As one of those who have been listening for years to the idea that arbitration is going to solve all our difficulties, it sounds to me like you think arbitration may have some difficulties of its own.

A Arbitration in its own, in the collective

bargaining contracts, is, as far as I am concerned, I agree with everything this Court and prior courts have said: it's an excellent way to put a safety valve on the -- and it's the one way that companies can live with unions and unions with companies and they can resolve their difficulties and the arbitrators in America today take a collection of these cases thatwill never get into the courts.

What happens is when you get a Title VII case -- and I'm not disparaging Title VII, but there isn't any treatment, Congressionally speaking as to how this thing will be treated. The Third Circuit Court of Appeals said: "This is a matter for judicial discretion as to how we're going to handle an interrelationship of Title VII and arbitration."

I think arbitration does a splendid job in the American industrial complex today.

Q When it decides your way --

A Pardon me?

Q When it decides your way it's --

A Oh, no, sir; I have been in the labor practice for 20 years and I'll take my lumps both ways. And I think it's a safety valve of no small impact.

Q Could I assume correctly that if you had a provision in the contract against discrimination on the basis of religion you would be arguing the exact same way you are now; wouldn't you?

A Yes, sir.

Q Let me try another hypothetical on you that may or may not be helpful to us. Suppose -- I don't know whether you have a union shop contract here, compulsory union membership, but assume that that's the kind you have, and suppose Mr. Dewey had a tenet in his religion that prohibits him from joining any organization against his will. Then we would have a collision between the compulsory union membership claims and the Civil Rights Act, I take it?

A Yes, sir.

Q I am going to ask your friend if he will comment on that in rebuttal, if they wish. What would your reaction be to that?

A Now, let me say this: that the hypothetical that you have posed and the actual case before you -- in other words, the union shop clause, the Taft-Hartley, the Labor RElations Act says that union shop can be negotiated and it is negotiated in practically every Government contract with which we are most familiar -- the union shop is indeed.

And also, in the case before you the Taft-Hartley also says that overtime, negotiation on overtime is a compulsory matter of negotiation between the parties and it would be negotiated, so that Taft-Hartley approves both of these situations.

And your question to me, I gather, is that

if there is a conflict between the situations as far as religion, I would have to say at this juncture that at the present state of the law that I would say that as long as the application is made to -- as long as the law is in its present state, and you apply the laws to everybody, the same rule, then there isn't any discrimination.

The question, I think, that you are getting at, or as I sense it, and in your sense is: what has the Civil Rights Act done as far as espousing discrimination? Some say, and I think this is the correct answer to your question: what they reall did -- what Congress really did, they took the First Amendment and moved it into the Civil Rights Act of '64. I say -- and that would be that you can freely exercise your religion in employment.

I submit to you, sir, that the language of -- if Congress were willing to do that they could very well have done it,but they didn't do it. So, the question is: the Civil Rights Act of '64 does not involve a First Amendment transplant. I think what it does do is equal employment opportunity and it says: "Look, will you please treat everybody the same as far as religion is concerned; treat them the same as far as sex is concerned; for instance, in Martin-Marietta you say, the Court says that you can't treat married women differently from married men.

This is equalization. So, under those circumstances

-- under those circumstances as far as your question is concerned, I would say that as far as I am concerned, I think the Civil Rights Act would not prohibit, would not strike down the union shop.

In summary on the interpretation of the act. The objective, as far as we are concerned, as we see the act, is equal employment opportunity. However the act describes discriminatory preference for any group, minority or majority, words from -- In our estimation Dewey is requesting preferential treatment not accorded to other employees. He has no such right under the First Amendment; he has no such right under the Civil Rights Act.

The Michigan Civil Right Act, and this was raised today -- the Michigan Civil Rights Commission, a constitutional body of the State of Michigan, treated this case as far back as 1966 and said that an employer has the right to establish a normal work week and forseeable overtime in its labor agreement and absent the intent to discriminate there was no right of accommodation and there is no violation.

I submit to you that the same results should obtain here.

I'd like to touch on one other aspect as far as Congress is concerned. There are a number of exceptions in this act and no one, with the exception of the Sixth Circuit, would pay much attention to them. The exception to which I

refer is limited -- and I think it exemplifies again what Congress intended. 703(h) specifies that it is not an unfair labor question for an employer to apply different terms and conditions of employment pursuant to a bona fide seniority system provided the differences are not resulting in intentional discrimination because of race, color, or religion.

Now, the questions in the Senate debate are very revealing and they asked at the time -- they said at the time that they intended the act was sure to conflict with the rights of seniority nor to affect the collective bargaining contracts which are based on bona fide seniority.

And in the Senate a question was asked: What if a Negro was the last man hired in your plant and when it came to a layoff situation and the seniority provisions in it, the junior man would be laid off, as historically is done. It may be a question of seniority; it may be plant-wide seniority. What if it says the junior man is to be laid off and this Negro is the last man in?

In the answer in the debates: "There would be no discrimination on that theory, but the low man on the totem pole, the junior man, goes first.

In the Reynolds overtime situation the application is based on the seniority clause negotiated years ago based on classification of seniority. You get your seniority when you go to the classification. No one chooses and picks or

does otherwise. You get it when you go in.

There can be no question as to the bona fideness of that classification, of the seniority. So that the assignment of overtime is tied to a neutral policy. So, less than -- arises, differences in terms of employment. I work on Sunday; you don't. You work on Sunday; I don't. This is the -- of the act, and as far as I am concerned, the Congress says this is an exception.

I want to touch on other other point and this was alluded to, I believe, by Mr. Justice White and by Mr. Justice Stewart at one point. Two things: the prohibition against discrimination, according to EEOC, includes an obligation to accommodate. The Civil Rights Act, as expressed in terms of prohibition, meaning the employer should not differentiate between employees on the basis of religion. I will restrict myself to religion.

The conflict of accommodation has no basis in this statute and in effect, is a form of discrimination itself. Accommodation in its simplest form means to adjust, to help, to do a favor for. The Civil Rights Act permits the EEOC to interpret the law. The Civil Rights Act doesn't permit the EEOC to legislate.

The Sixth Circuit, on page 32 of our brief, said that the requirement of accommodation is not consistent with the act. The Stempler case from California, which was refused

certiorari by this Court, a lower constitutional question because the relationship is the Government to an employee, also takes the position that accommodation is not necessarily under the First Amendment.

The Eastern Greylines case on page 33 of our brief, a decision of the highest court of the State of New York, holds that as to accommodation one not need make an accommodation to particularization which could assume many variations in appearance and in train schedules.

And not only is there apparent as far as we are concerned that accommodation constitutes legislation, not interpretation here. As to Mr. Justice Stewart's question, I think that the operation of accommodation by the EEOC, of compelling employers to accommodate, raises the question of whether you are not into the Establishment Clause of the First Amendment.

In Schemp you held that the Government must be neutral with respect to religious matters. In Gillette versus the United States this term, you said that as a general matter the Establishment Clause prohibits the Government from the -- secular purposes in order to put its -- on one religion or in religion as such. Or to favor the adherents of any sect or religious organization, by issuing guidelines to the EEOC, by issuing guidelines by which religious beliefs ought to be accommodated, the Government finds itself putting

its _____on religion as such and this means to us a violation of the Establishment Clause.

If the Government as a general rule is without power to support or favor any religion it is submitted that the effect in this case is that the EEOC is, in fact, favoring religion through its guidelines and such action could well be unconstitutional. This question was raised in the Sixth Circuit.

Another step, and this was raised also by you gentlemen and I think by Mr. Justice White. If accommodation is required I suggest that the guidelines exist in it. Section 713(b) provides the guidelines upon which and this is the Congressional Act, the Civil Rights Act, if you are in conformity with the guidelines, you can rely on the guidelines it's a bar to action on proceedings under this act.

The first guidelines, and the guideline which should be applied in this case, is the 1966 guidelines. The employee Dewey was disciplined and subsequently discharged in August and September of '66. The '66 guidelines set forth for the first time the principle of accommodations as being included within the ambit of discrimination. But, look what that guideline said, that -- at 1605183(?) it said, "However the Commission believes that an employer is free under Title VII to establish a normal work week generally applicable to all employees, notwithstanding that such schedule may operate

with uniformity in its effect -- may not operate with uniformity in its effect upon the religious observances of one's employees.

This is the '66 guideline. Reynolds established a normal work week generally applicable to all employees long prior to the discharge of Dewey, long prior to the effective date of the Civil Rights Act, and long prior to the effective date of the guidelines. When the guidelines came out in June of 1966 they looked at those guidelines -- they were squarely in favor of those guidelines, with the exceptions written into the '66 guidelines. That guideline sets forth the uniformity of application theory and specifies that regardless of the impact if you have a uniform application you agree you have a _____ to this section.

And I submit to this Court that this case should have been taken care of by the EEOC years ago under its own guidelines. I recognize that the guidelines were changed in 1967, a year later, but the law as written by Congress, if anybody is interested in it, and I know you gentlemen are, but the question -- as the law was written it says: This guideline or any guideline if you are conformity with it, if you rely on it, under those circumstances it will be a bar to any action for discrimination even if the guidelines is subsequently changed by judicial fiat, by administrative decree; it makes no difference.

Again, look at the 1966 guidelines. It says: Here are some illustrations: what do you mean by accommodation? It says: We authorize the employer -- the employer should be authorized to prescribe the normal work week and foreseeable overtime requirements and absent any intent to discriminate an employee who holds or has reason to believe that the requirements of his employment will conflict with his religious beliefs does not entitle him to request an accommodation of his religious needs.

We negotiated our compulsory work clause of the sixties. Mr. Dewey obtained -- and there is no question -- he obtained his religious scruples in 1961 for the first time. When he did he had knowledge of our compulsory work clause and under the guidelines he knew that our schedules had presented him with a problem and whether you like it or not, or whether we like it or not, the EEOC at that time said that as far as they were concerned in such a situation you don't have a right to requrest any accommodation.

And then you go another step: what's the accommodation in the guideline? The accommodation in the guideline is time off; that's what it means, and I submit to you that that's what we have done as far as time off is concerned. We have reasonably accommodated if there is an accommodation obligation.

And the further question as raised by the Petitioner

and by the Government, is: "Look, when you get down to basics, why don't you take the step and get the substitute?" Our answer is this: In 1960, prior to '60 you couldn't work overtime. We negotiated the compulsory overtime clause. We worked hard for that and in 1965 it was renegotiated. It has subsequently been renegotiated beyond the confines of this recordand a settlement of a strike ensued, partly under that clause.

Disregard that if you will, but it's hard won, this clause.

Now, under those circumstances you get the substitute. If we get the substitute three things happen, we feel. One, and we went into this a little bit, Mr. Justice Blackmun, at that point -- one: if we get Dewey's substitute obviously we have to get all religious -- substitutes for all religious people who request it.

Now, the second step is: what holds you to that? In other words, if you accept as to one element in your organization, there are no -- or bars to excepting to all. The Government says at a particular point in its brief, as does Petitioner, that in that situation what you should do is you should except as to the religious people and to impress the other people; make the nonreligious people work, because the Civil Rights Act takes precedence over the contract.

I submit to you that what we are doing -- what they are suggesting that we do, we'll be back here, God willing, in approximately two or three years under the situation where what we then are doing is making people work who have no religious beliefs -- whatever their beliefs are, we must say there are no religious beliefs and under that circumstance the religious people are free and those without religion are impressed into work.

I think that's a discrimination of the Civil Rights Act of '64. I think we're making our decision basically on religion. This is just what the act says. I think this is intentional discrimination. I also think it's a violation of Title VII and it is also a violation of our labor contract because such a situation would be making us go back up the ladder and skip those seniority people who have no religious exception.

And under these circumstances we not only have the answer, we will have arbitration. If we accept as to religion I am willing to file on the other side. If I were an employee and I were the UAW I would pause through arbitration to determine the extent of the waiver of the -- of the exception of what we are doing.

And we submit to you that if we were forced to get the substitute, these results come about, we will be back, and as the Biblical expression: "As our last days will be worse

than our first." In other words we will be back to pre-'60. We will not be able to work overtime to meet our demands. We will possibly be faced with a Title VII violation. We will also be faced with a violation of our contract.

So, under those circumstances I think if you want to talk in terms of the '66 guideline that certainly is a serious inconvenience; if you want to talk about the '67 guidelines that's undue hardship.

I would say that as far as we are concerned that we have not violated the contract -- the Civil Rights Act under any interpretation of the law and I would like to touch upon the election of remedies briefly. And in that area the two general theories that have evolved, of the theories that were posed here today, the Sixth Circuit saying that the claims that when you have an employer changing adjudication and arbitration he should not be permitted to proceed on the same claim because you impose upon an employer multiple legal actions on the same claim and you can lead to an eroding of arbitration as a final remedy.

The second theory is phrased in terms of Hutchings and Bowe, in terms that the rights and remedies under arbitration under Title VII are separate. And I mentioned this briefly, but I wish you would bear with me. In the briefs in the grievance that was presented, in the arbitration or grievance part of the contract, it was said that it was a clear

case of discrimination on the part of the company in applying its policy to Petitioner.

In the process of arbitration in which Petitioner was represented by the International Rep of the UAW, and I might add, notwithstanding in its ramifications, I think that in an arbitration in those areas that the International Reps of mmost unions are as skilled, if not more so, than many lawyers, and do a better job because this is their bread and butter, vis-a-vis a lawyer who doesn't specialize.

But I say that in that situation the union suggested in that arbitration that the effect of the application of the labor agreement resulted in discrimination against its employees who seek to be excused from assigned work for reasons of religion.

Now, the arbitrator found the employee could not refuse to work on Sunday because/the wording of the labor contract and the employer's consistent administration as to all employees of the relevant provisions of the agreement.

I submit to you that the argument that the rights under arbitration are different from the rights under the law or under the statute, doesn't stand up. They are the same in this case. Again, the distinguishing fact, according to the Fifth Circuit, the remedies are different. And I have said before, in this case what is the remedy? The remedy in arbitration is reinstatement and back pay. What is the remedy

under the statute? It's reinstatement and back pay. Someone would add: Yes, but you can get an injunction, under Title VII in the statutory classes.

I say you can get a decision of an arbitrator which acts as precedent. So that I submit that under the circumstances the better judicial principle would be that enunciated by the Sixth Circuit and the District Court of California, to the effect that you may pursue both remedies as long as you know that when you get a decision in one then the issue becomes moot in the other form.

It would appear that this approach to the question would also be sound administratively, speaking in that recurrent jurisdiction brings waste, confusion, form shopping and what appears to be an unnecessary series of litigation and I have given away part of my argument in the sense that I think that as far as arbitration is concerned, that Mr. Justice Black discussed the finality of the arbitration. I think that we are in serious difficulty as a remedy and I recognize Lincoln Mills and Boys Markets and Steelworkers Trillogy(?) and everything that this Court has said.

And it can be undone if you allow a concurrent jurisdiction theory. And then I write in to my arbitration; I write into my grievance: you have violated my seniority provisions because you didn't follow the wording of the contract and -also I am 49, because of age, and you say that this

is ridiculous. What's that got to do with age? Don't use age; use religion. Use color; use sex.

And I say under those circumstances this is what is coming in this situation that you then have two bites of the apple in every situation and, unlike the National Labor Relations Act, the matrix of the Civil Rights Act is interwoven into the labor contract.

Everything that you do in the labor contract -- all the conditions that you cover involve, and the working conditions cover the prescriptions of the Civil Rights Act so that as far as I am concerned the election of remedies theory should be applied.

I -- Arguelles is very interesting. Inthe problem that was raised there and I think this problem that is raised here is much more significant than the problem, with all due respect, to Arguelles, because the impact you are going to suffer, that we are going to suffer on arbitration as a final process.

So, under these circumstances I would conclude by saying that it is submitted that the Civil Rights Act -- under the Civil Rights Act, management should have the right to establish working schedules, including overtime. The working schedules in this case were applied on a uniform and nondiscriminatory basis. An employee has a duty to observe these work schedules that are so established; and four: the

religious beliefs of an employee don't entitle an individual to special or peculiar privileges denied to others.

From a practical point of view you gentleman are faced with an enormous problem -- I am a lawyer from a Mid-Western State and I am overwhelmed at some of these problems, but I want to pose the problem that faces you eventually.

According to the '62 yearbook of American Churches, which is the nearest year that I could tie to the Dewey discharge in '65, there were 259 religious bodies supporting membership in the United States. They had a membership at thatpoint of 114 million people. The work force of the United States today amounts to 70 million employees.

As to religious observances of various days I selected four categories. I chose Catholic because I am one and I wanted to see what they did. There are 52 Sundays and 13 holidays, holy days for a total of 65 particular days where this accommodation may work in.

The Jewish religion has 52 Saturdays and 30 other holy days for a total of 82 days.

The Greek Orthodox has 52 Sundays and ten other holy days for a total of 62 days.

The Seventh Day Adventists as best I could see, had 52 Saturdays.

The total of these four religions alone amounted to approximately 261 days upon which employees under the EEOC

accommodation theory might ask for accommodation in terms of time off. The problem of scheduling, the problems of extra manpower, the problems of administration which are difficult in ordinary situations, become a great deal more complicated.

Such an analysis brings into perspective the statement of the California Court of Appeals in the Stemple matter, where they said:

"The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer, to accommodate each employee's particular scruples place an intolerable burder upon the state," and accommodation was not required.

It is submitted that the EEOC approach also places an intolerable burden upon the private employers of America if the Court should accept the EEOC version of the law. We submit that it is not only intolerable; it is illegal under our constitution and under our laws.

Thank you gentlemen.

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

Mr. Oosterhouse.

REBUTTAL ARGUMENT BY DONALD F. OOSTERHOUSE, ESQ.

ON BEHALF OF PETITIONER

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

First to respond to the possible broad ramifications

of employers sometime in the future accommodating all of the different possible religious dates, let me just say that I am sure that Congress was fully aware of the diversity of religion in this country when it passed the Civil Rights Act, and said: "Employers shall not discharge because of religion."

I think this is an argument not to this Court, but to the Congress to repeal this part of the act.

Q Do you think the employer here would be discriminating on the basis of religion if he permitted your client to avoid overtime on the basis of his religion and say nevertheless, the Seventh Day Adventist is going to work on Saturday or be fired?

A He would have to give the Seventh Day Adventist relief on Saturday under the same circumstances. Now, if the employer was working a full shift on Saturday and a partial shift on Sunday --

Q If the employer in your case can easily find a replacement you say he must do so?

A Yes, Your Honor.

Q And if he can easily find a replacement for a Seventh Day Adventist on Saturday he must do so?

A Yes, sir.

Q And even though that duplicates all sorts of company records and things like that and if he has two employees instead of one for six days.

A Well, the question is always to be decided in terms of undue hardship, but if, as we say inthis case, and I think the evidence quite clearly shows this, it was easy for Reynolds to find a replacement for Dewey then --

Q You don't know that, do you?

A I think --

Q All you are saying is that were so many employees who weren't busy.

A They were available.

Q How do you know they were available; they weren't asked.

A The stipulation says that they were available.

Q Available, what does that mean if they were -- that they would have come without any objection?

A That's the way I understand it.

Q What if they would have come without the union even objecting or what?

A I think that the stipulation saying that they were available combined with the other items in the stipulation showing that employees could get other employees when they had no power to compel them means that these people were available without recourse to the compulsory overtime clause.

Q So that's the basis that we take the case

that all an employer had to do was pick up the telephone and he would have a replacement.

A This is correct.

Q That's the purport of the stipulation?

A Right.

Q Mr. Oosterhouse, suppose there are two of us, me and Dewey and neither of us won't work on Sundays, period. We just don't like to work on Sunday because it's a good golfing day. Dewey cannot be discharged, but I can.

A I think that this is --

Q Is that right?

A The statute says --

Q Aren't you discriminating against me because of religion or lack of it?

A Well, the statute says that you may not discharge because of religion and certain other things.

Q Is there anything in Dewey's discharge that says because of religion?

A I think the evidence shows --

Q Does anything in the discharge say religion? That you are discharged because you are a member of blank, blank church?

A No. It's a discharge because of conduct flowing from his religion.

Q So, it's effect and not cause?

A This is a way to say it; yes. The effect of this practice was the cause of his discharge because of religion.

Now, I think to come back to the question on golf, there is, and the statute sets up certain classifications as being entitled to protection. There is at that point ato some extent, a preference for consideration for religion, race, sex, as compared to considerations of golf or other strictly personal preferences.

Q Well you would say Congress would have the power to pass a statute which would say that a company may not lawfully force with the threat of discharge hanging over him, if he doesn't, force any person to work on Sunday who has religious scruples.

A I think it's paramount to the constitutional right of free exercise where the compelling state interest has been adopted and I see that the undue hardship as a parallel limitation and whether this is a limitation on the power of Congress or strictly on the interpretation of the act, I am not sure.

Q Well, in effect, the guidelines say that in certain circumstances you may not override a person's religious scruples amd make him work on Sundays?

A This is correct.

Q Well, I take it then that you would say that

Congress could just impose a flat ban by statute that said that no work on Sundays for those with religious scruples?

A I would think that that is what --

Q But we won't excuse golf players.

Q Or agnostics.

A Well, agnostics might be in a different category. Maybe this is --

Q Golfing agnostic?

A But golfing is not. There is a distinction drawn between the protection of religion and the other categories as distinguished from golf.

Q Well, the agnostic comes in and says, "Well, I don't want to work on Sunday either. It's not because of my religion, but because I just don't like to work on Sundays. You can't discriminate against me. I don't have religion, but if you let some off who do you are discriminating against me.

A The statute prohibits discrimination on certain classifications and to the extent that therefore people in those classifications have a right not to be discriminated against they are, to that very limited extent, preferred over people in classifications who are not.

Q Do you think Congress has as much power to do that as it would to exempt people from the draft on account of religion, I suppose?

Q There is quite a difference, isn't there,

in religion and doing something to somebody on account of their professions of faith, or on account of the conduct which they say their professions of faith require. You would say that; wouldn't you?

A There certainly is --

Q It was held so about the Mormons.

A It is distinguishable; yes. But, I think the act protects both the belief and the conduct itself.

Q But it wouldn't protect the -- if he married three times, would it?

A No. You get the compelling state interest or the undue hardship as the balancing factor.

MR. CHIEF JUSTICE BURGER: We will recess at this time, Counsel.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was concluded)