In the

Supreme Court of the United States

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO,	)	
Petitioner	)	
v.	)	No. 73-765
QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD	)	
Respondents.	)	

Washington, D. C.
November 18, 1974

Pages 1 thru 49

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v.	No. 73-765
QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD, Respondents.	

Washington, D. C.

Monday, November 18, 1974

The above-entitled matter came on for argument at 11:38 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Asociate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justive
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BERNARD DUNAU, ESQ., 912 Dupont Circle Bldg., N.W. Washington, D. C. 20036
For the Petitioner

JOHN E. JENKINS, JR., ESQ., Attorney for Respondent, Quality Manufacturing Company

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-765, International Ladies' Garment Workers' Union against Quality Manufacturing Company.

Mr. Dunau.

ORAL ARGUMENT OF BERNARD DUNAU, ESQ.,

ON BEHALF OF PETITIONER

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

The question this case presents is whether an employer may coerce an employee to participate in an interview with that employer, unaided by a union representative, where the outcome of the interview is reasonably believed by the employee to subject him to the risk of disciplinary action.

More specifically in terms of this case, an employee is called in to talk to the employer and the board finds that the employee reasonably fears disciplinary action.

May that employer fire the employee because she refuses to submit to a private interview?

May that employer fire the two employee representatives, her fellow employees who are the shop-ladies in the shop, because they seek to provide the representation requested of them?

QUESTION: And all of this, Mr. Dunau, against the background of a collective bargaining agreement that is silent on the subject. Right?

MR. DUNAU: That is correct, sir.

Well, I should say, the trial examiner did find that the agreement was not silent on the subject. The trial examiner construed the agreement to mean that, by agreement, the employer was required to confer the representation in this instance.

We don't think that is determinative but if the agreement were silent, or if the agreement certainly is as construed here, that is the question that is presented.

We don't have, in other words, an agreement which bars union representation.

QUESTION: No, but your claim is that the law, the statute confers --

MR. DUNAU: Our claim is that the statute confers the right.

QUESTION: Right.

MR. DUNAU: Yes, sir.

QUESTION: When there is a collective bargaining agreement.

MR. DUNAU: No --

QUESTION: When there is a bargaining representative.

MR. DUNAU: Well, no, it would even go beyond that because our view would be that concerted activity for a mutual aid or protection would exist even though there were no union in the picture.

Suppose, for example, an employee is called in to a private interview in which she reasonably fears subjection to discipline. Because she fears it, she asks a fellow employee to come along with her.

In our view, that is concerted activity. When that fellow employee is willing to furnish the aid, she expects, of she can surely be expected to suppose that when her turn comes, she will be helped, so that even in a non-union situation, helping the other employee is concerted activity for mutual aid or protection.

QUESTION: Well, helping them do what? In the absence of a collective bargaining agreement; in the absence of the bargaining representative, the employment would be an employment at will, wouldn't it?

MR. DUNAU: But it is not employment at will in the sense that, when an employee is exercising a statutory right, that that employee may be fired for exercising that right and that statutory right, concered activity for mutual aid or protection, one employee asking another to assist him in meeting with the employer is concerted activity for mutual aid or protection.

QUESTION: You'd litigate that where?

MR. DUNAU: Pardon?

QUESTION: Where would you litigate that?

MR. DUNAU: Before the board.

QUESTION: Before the board?

MR. DUNAU: Yes, sir.

I am arguing the harder case because that is not the case we have here. We have a case here of union representation.

QUESTION: Does the fellow employee -- does the employer have to pay the fellow employee for the afternoon he takes off?

MR. DUNAU: No, sir. He doesn't have to pay him, even under a collective bargaining agreement, unless the collective bargaining agreement provides for compensation for the steward in the conduct of union business. There are such agreements.

QUESTION: But it is at the option of the fellow employee to decide whether or not he takes off or not?

If the first employee is summoned to an interview with the employer.

MR. DUNAU: No, that may not be at his option. The employer may be required -- if he doesn't want the fellow employee to do it during his union hours or during working hours, to say, okay, do it after working hours. But

it is not a privilege in the employer to refuse to meet or to compel a meeting with an employee without the assistance of a fellow employee, if that is requested.

I think the facts, as they are stated, should focus this issue rather sharply.

On the employer's side we have three people, a Lawrence Gerlach, who is the president of the company, his wife, Kathryn Gerlach, who is the production manager, their son, Lawrence Gerlach, who is the general manager.

QUESTION: Junior.

MR. DUNAU: Junior, yes, sir.

There is a certified bargaining representative, certified to represent the production employees.

On the union's side with respect to day-to-day problems which arise, there is a shop chairlady called Delila Mulford. There is an assistant shop chairlady called Martha Cochran. They were elected to their posts.

And then there is a longtime employee, a Catherine King, about whom these events center.

On Friday, October 10, 1969, the three Gerlach's, the shop chairlady, Catherine King and two other employees meet.

The employees are complaining about the wage rate. They say they can't make a decent wage under the piecework system in effect. The meeting ends in an acrimonious

exchange. The Gerlachs say, "If you don't like it here, go elsewhere."

Later that same afternoon Catherine King shuts down her machine. She starts gesturing with her hands. She causes a minor disturbance. Mrs. Gerlach tells her, "Resume production."

Catherine King tells her, "Mind your own business."

At that point, Mrs. Gerlach says to King, "Go down and see the president, Mr. Gerlach."

She goes. But on the way, she asks the shop chairlady to accompany her to assist her at this meeting with the president.

When they get there, the Gerlachs object to the presence of the shop chairlady and she responds, "Catherine paid her dues and she is entitled to have me be there."

Since Catherine refused to submit to the interview without the presence of the shop chairlady, and since the Gerlachs refused to have her there, they were both sent back to their work stations.

The first blow fell on Sunday, October 12th.

Mulford is called on the telephone. She is told she is suspended for two days and the reason is that she attempted to represent Cahterine King.

The next day, Monday, October 13th, again, King is called to the office. This time she asks the assistant

shop chairlady, Martha Cochran, to accompany her.

Martha Cochran's presence is objected to. Cochran asks, "What do you want to speak to King about.

She is told, "We want to take up where we left off on Friday."

To which Cochran responds, "Well, I'm sorry, but if that's what you want to talk to her about, that is union business and she has asked me to represent her. I am a union steward and that is my duty."

[King was]

Again, Gerlach refused permission to return to work because she refused to submit to a private interview.

Cochran's time card was pulled from the rack.

The next day, Tuesday, October 14th. Cochran is now suspended for two days for seeking to represent King and King is not allowed to return to work because she refuses to submit to an interview without the presence of her union representative.

Wednesday, October 15th, Mulford's two-day suspension is at an end. The three of them go to the Gerlachs. Cochran is told she can't return to work because she has got one more day suspension.

King is told she can't return to work unless she submits to a private interview.

Mulford is allowed to return to work but she is admonished to mind her own business, to which she responds,

"I was minding my own business. Catherine had a right to representation as well as anybody else."

And the events culminate on October 16th.

Cochran's suspension is now at an end. All three go to see Gerlach. Cochran gets her time card. She is allowed to return to work.

King is told, submit to a private interview. She asks, "With Delila Mulford, the shop chairlady?" She is told no, not with Delila.

She is also told, "If you walk out that door, if you again refuse to submit to a private interview, you are finished."

She walked out the door. She was finished.

Mulford asks, "What about me?"

She is told, "You are finished, too."

That is two of them. Cochran is left, but not for a very long time. That day, she submits, or tries to submit, written grievances to Gerlach, Jr., written grievances complaining of King's discharge, her suspension for two days, Mulford's suspension for two days and her discharge.

Gerlach, Jr. says, "I've got no time to fool with them damn things. I'm going out of town."

She puts the grievance on the desk. He picks it up and throws it in the trash basket.

Gerlach, Jr. takes her time card from the rack.

He tells her, "You worked this morning but you are not going to work this afternoon."

She then goes to Mr. Gerlach, Sr. She asks him, "Am I fired?" and she is told, "You want to draw unemployment compensation, go draw it," and that is the end of the third person.

Now, the board and the Court of Appeals are in agreement as to one matter. The board found, and the Court of Appeals agreed that Cochran's firing was an unfair labor practice because she had presented a grievance. The axe fell after she presented a grievance. That was protected union activity and her reinstatement with back pay is required.

QUESTION: That issue is not here.

MR. DUNAU: That issue is not here, your Honor. There is no cross-petition.

The board and the Court of Appeals disagree as to the Mulford and as to King and as to Cochran's suspension for the two days preceding her discharge.

And as to that, the board finds King reasonably feared that she would be subjected to disciplinary action in the event -- or as a result of the outcome of this interview.

Since she reasonably feared subjection to disciplinary action, the employer had two alternatives.

If the employer wanted to talk to her, she was entitled, the employee, to have the union representative there at her request.

The employer, if he didn't want to talk with her with the union representative present, was free not to have the interview at all.

But the employer could not have it both ways. He could not have both an interview with the employee and effacement of the union representative.

In the board's view -- and we can summarize it in the two sentences it wrote in the later case, "It is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview that may put his job security in jeopardy. Such a --"

QUESTION: Would you help me out a little?

MR. DUNAU: Yes, sir.

QUESTION: It all sounds to me like we are -- this reasonable belief business brings us right back into subjective criteria measurement, doesn't it?

MR. DUNAU: No, sir, I don't believe it does, unless we are to say, every time we have a standard which says we will determine what is done by reference to

what a reasonable man in the circumstances would do, if that is subjective, then it is subjective.

If we do as we do in many other fields, we say, "Action may be taken on the basis of reasonable belief." If that is subjective, then we are subjective.

But if, as we have supposed, the very notion of reasonable belief is that it is not subjectivity that controls, that you determine reasonable belief by observation of external circumstances and what, based on those external circumstances, one can reasonably infer, then there is no basis for saying there is any subjectivity to the standard which the board has adopted.

And as to that standard, if I may continue with respect to it, we have had experience. There have been board cases. In this case, there was no question and could be no question about the employee's reasonable basis for fear.

In the next case, there surely could be no question that the employee reasonably feared loss of her job.

In the case which the Seventh Circuit decided, a case of alleged theft, there was, again, no question of reasonable belief.

When these things occur under collective bargaining agreements, when they occur when arbitrators interpret

collective bargaining agreements, when they occur as a matter of every day routine in many plants, the obstacle is not any concern that the employee has no reasonable belief.

QUESTION: In this case, Mr. Dunau --

MR. DUNAU: Yes, sir.

QUESTION: -- had there been a reasonable belief of discipline or discharge when she hadn't done anything that, under the collective bargaining agreement, would permit a discharge -- had she?

MR. DUNAU: Had she done anything?

I'm sorry, your Honor.

QUESTION: That under the collective bargaining agreement would warrant discharge. All she had done was, along with three or four other people in the morning, protested that the existing piecework wage rate hardly allowed them to make a living.

MR. DUNAU: The basis for a reasonable belief, sir, I think could be illustrated by what Mrs. Gerlach testified to at the hearing at page 79.

QUESTION: Of what?

MR. DUNAU: Of the single Appendix, your HOnor.

On cross-examination, talking about Mr. Gerlach, Sr.

QUESTION: What page is that?

QUESTION: 79.

MR. DUNAU: Page 79, sir.

"You wanted him to correct her, didn't you?"

"No, sir, I wanted to take her down because she sassed me."

"You wanted your husband to correct King for this sassing."

"Yes."

Now, I don't see how it can be said, when Mrs. Gerlach says she wants to have King corrected for sassing, that at least there is not a reasonable basis for apprehension that she will be reprimanded or suspended or indeed, perhaps, discharged. We know this employer was fast on the trigger.

He did, in fact, suspend two people and he did discharge two people.

QUESTION: Well, could, under the collective bargaining agreement, could she have been discharged or suspended for being sassy?

MR. DUNAU: That would depend on what an arbitrator would determine when the case was presented to an arbitrator.

QUESTION: What did the agreement provide vis-a-vis suspension or discharge?

MR. DUNAU: That there shall be no suspension or

discharge without just cause.

The question for the arbitrator would then become, is it just cause to suspend or discharge this employee because she sassed her boss?

I think I know what my answer would be, but I don't know what a particular arbitrator's answer would be under the circumstances.

QUESTION: Or what Junior's answer might have been here.

MR. DUNAU: Or what Junior's answer might have been, yes.

But it is certainly clear that when she is asked to go to the bosses office following an altercation with the bosses wife that an employee has reasonable grounds to fear the imposition of discipline.

QUESTION: Mr. Dunau --

MR. DUNAU: Yes?

QUESTION: Would you go so far as to impose on the employer the duty to inform the employee of her right to representation?

MR. DUNAU: No, sir, we do not take that position. If the right exists by statute, the unions will be sure to inform their employees what their rights are. We do not expect the employer to inform the employee of his rights.

QUESTION: Is this a matter often covered in

collective bargaining agreements, Mr. Dunau?

MR. DUNAU: It is covered in collective bargaining agreements. I am unprepared to say the incidence of the coverage. It is covered in major collective bargaining agreements, in the Steel Workers' agreement, I believe in Goodyear, I believe in Auto.

I have seen it in other agreements but I have no basis for saying the incidence of it.

QUESTION: Do you agree that the origin is not in the duty to bargain? Or is it in the right to collective action?

MR. DUNAU: The origin of the duty as it exists and is found in this case is Section 7 and not Section 8(a)(5).

QUESTION: Do you agree with that?

MR. DUNAU: If I had my druthers, it would be both, your Honor, Section 7 and Section 8(a)(5), but saying it is not Section 8(a)(5) does not compel the conclusion it is not also Section 7.

QUESTION: Yes. Well, I just wanted to ask you then, what about it when there is no union?

MR. DUNAU: If it were an 8(a)(5), then there would be no right in the employee because there would be no bargaining representative.

Since I place it, or the board places it at

Section 7, the bargaining representatives present is a matter of indifference because an employee, when she seeks the help of a fellow employee that is engaged in --

QUESTION: I understand that she could request somebody else -- if there is a bargaining agent, could request somebody else besides the bargaining agent to go over there.

MR. DUNAU: That depends upon the reading of the proviso. On my reading of the proviso, yes, but there is rather respectable authority the other way.

QUESTION: Well, what does the proviso say -- if we happen to agree with you in this case, we might get another one -- what is the employer supposed to do when the union wants to be there but the employee wants somebody else.

QUESTION: Another fellow employee or a private lawyer?

MR. DUNAU: If there is a bargaining representative and that happens, we are going to have, I am afraid, one grand hassle as to what --

QUESTION: Well, I take it --

MR. DUNAU: -- as to what the Section 9(a) means.

QUESTION: -- I take it you are also going to be settling it in the bargaining agreement.

MR. DUNAU: Well, if it's settled in the bargaining -- well --

QUESTION: You are going to try to settle --

MR. DUNAU: We may try to settle it in the bargaining agreement, but if there is a statutory right in the employee, under the proviso, it doesn't matter what we put in the agreement, we can't make an agreement which abrogates what the employee is entitled to.

QUESTION: Section 7 gives the right that you are asserting.

MR. DUNAU: Section 7 gives the right we are asserting, yes.

QUESTION: Then nothing in the collective bargaining agreement could supercede it, could it? If any employee is entitled, statutorily, under Section 7 to bring any person of her choosing who is a fellow employee -- I don't think it would cover a lawyer, but collective or considered activity for other mutual aid or protection.

That is the language you are relying on.

MR. DUNAU: That is the language which we rely on, but I would have to say in candor, if there were a bargaining representative and a collective bargaining agreement, I think we would be required to mesh that general language with what the meaning of the proviso is and I am not sure that that is a very easy question.

QUESTION: Well, what about after a grievance is filed?

QUESTION: Right.

MR. DUNAU: After a grievance is filed, as I recall the law generally in this area, the board says, and the courts have agreed, you cannot have a rival union present the grievance.

I don't believe they have said that you cannot have an experienced fellow employee in.

QUESTION: Or an inexperienced one.

MR. DUNAU: Pardon?

QUESTION: An inexperienced one.

MR. DUNAU: An inexperienced one, someone that you trust you would like to have with you.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, a recess was taken for luncheon until 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Dunau, you may proceed.

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

Justice Rehnquist asked about whether an employee who was asked to represent another may just walk off the floor at his wish.

There is a particular finding of fact in this case which disposes of this problem, at least for this case and this is on page 8a of our petition, the white [brief].

Turning next to the company suspensions of Mulford and Cochran, the company claims that both employees were suspended for being away from their machines without permission.

The trial examiner finds this reason was protectual -- pretextural. There is ample evidence in the record to support, and we adopt this finding. In particular, we note that Mrs. Gerlach testified that union chairladies had left the floor in the past on union business without being disciplined.

It follows that the disparate treatment here was motivated by the company's desire to punish Mulford and Cochran for performing their duties as union chairladies in seeking to represent King at the conference at the

company's request.

We have taken the position that at the heart of this case is Section 7 and that it is irrelevant to this case that there may be no concommitant Section 8(a)(5) bargaining obligation.

We think we can illustrate it by a case that this Court has already decided, one called Washington Aluminum where a group of workers in protest against the lack of heat in the plant walked out as a body. They were discharged That discharge was held to be an unfair labor practice because these employees were engaging in concerted activity for mutual aid or protection.

Yet those same employees did not and could not have the advantages of bargaining because they had no bargaining representatives. Precisely here, as in that case, the concerted activity for mutual aid or protection existing, the employees were free or should be free of reprisal for that conduct, whether or not the employer had an additional obligation to bargain with the union representatives.

In this case, we think that union representation is surely at the essence of concerted activity for mutual aid or protection.

Employees join unions for the precise purpose of pooling their strength and dealing with their employer on equality. In this case, the employees pooled their

strength. They elected one of their number to represent them.

When that person, elected by the others to represent them, seeks to provide the representation which the employee asks, it is concerted activity for mutual aid or protection in the most simplistic sense of that term.

That view is also consonant with what the Section 7 is all about. It is all about eliminating individual helplessness in dealing with an employer and it is especially manifest in this kind of situation when an employee is asked to confront his employer in a situation where the risk of discipline exists, that employee is in a precarious position.

That employee may be inexperienced. He may be ignorant. He may be frightened. He may be unable to express himself.

Those disadvantages are overcome by having a union representative at the interview so that he is not exposed to unmerited discipline because he is scared, is frightened, is inarticulate.

QUESTION: Have you recited us any cases, Mr. Dunau, on this matter of having some next friend or representation in grievance procedures generally?

MR. DUNAU: No, sir. We have not. The reason we have not is that in this case no conflict arises between what the representative wants done and what the individual

employee wants done.

QUESTION: But it is common practice in grievance procedures to have the employee accompanied by someone, is it not, the shop steward or --

MR. DUNAU: Ordinarily, at the first step of the grievance procedure under a union contract, the employee is given the option either to present the grievance to the foreman on his own or to have the union representative --

QUESTION: Not employer. You mean --

MR. DUNAU: I'm sorry, the employee is given the option, either to go it alone, if that is what he wants, or to have his union steward, if that is what he wants.

Now, I did mention something about an experienced friend, or an inexperienced friend accompanying the employee and what I had in mind was this decision Hughes Tool Company versus the Labor Board out of the Fifth Circuit at 147 Fed. 2nd '69, which was a pre-Taft-Hartley decision in which the Court of Appeals held that a rival union could not represent the employee.

But it went on to say, "We think an inexperienced or ignorant griever can ask a more experienced friend to assist him, but he cannot present his grievance through any union except the representative.

"On the other hand, the representative, when not asked to present the grievance, but is attending to safeguard

the collective bargaining, cannot exclude the griever, and withdraw his grievance or destroy it by not permitting it consideration."

Now, the extent to which the proviso is cut into what would otherwise be the exclusive authority of the representative is an extraordinarily difficult, and in my view, unresolved problem but we don't have it in this case because in this case we have consonance between what the employee wants, representation by his union steward -- that is what he is entitled to, that is what was foreclosed to him by the employer's actions.

QUESTION: And if the employer says, "No, I won't talk to you if you have your representative along," the board says he need not talk but he can terminate the interview, but if he does that and then fires the man without any further conversation, that is automatically an unfair practice.

MR. DUNAU: Well, if the firing is because he refuses to talk without the presence of the representative, that is an unfair labor practice. That is this case.

QUESTION: Well, what if he says -- well, what if the reason is, he says is because you were doing bad work or something? If he can sustain that, he can fire him.

MR. DUNAU: Because then the discharge is not because the employee refuses to submit to a private

interview. The discharge is because the guy was negligent or otherwise inefficient. If that is the reason for the discharge, the only recourse the employee has is under his collective bargaining agreement, to present the question to an arbitrator to determine whether just cause for discharge existed.

It is not at that point a Labor Board question.

QUESTION: Well, then, do I understand that what you are telling us now is that the employer could reject the presence of the second person?

MR. DUNAU: So long as at the same time he terminates the interview.

He can't have it both ways. If he wants the interview and the employee requests it, the union steward must be allowed to participate in the interview.

QUESTION: Does this not then mean, in response to Mr. Justice White to say that if there were substantial grounds for the discharge, the discharge would be sustained on its merits? Or did you answer it that way?

MR. DUNAU: Yes, I did answer it that way and that is precisely illustrated by --

QUESTION: Well, I am a little bit lost as to what's the consequence of refusing a conference with the presence of a second person.

MR. DUNAU: Well, let me see if I could illustrate

it by the --

QUESTION: Well, the risk is like it happened in this case.

MR. DUNAU: I beg your pardon, sir.

QUESTION: The risk is that it might be found that he fired him because he refused to --

MR. DUNAU: In this case, that was the finding -- that was the evidence, that the discharge was because you refused to submit to a private interview.

QUESTION: But the employer could refuse to permit the second person to be present but he would nevertheless be sustained in the dismissal if he had appropriate grounds, independent grounds.

MR. DUNAU: That is precisely the situation that was presented to the Seventh Circuit in the Mobile case where the employer refused to grant the individual's request that he be represented by his steward, but the employees were then discharged for theft.

The board found that the discharges for theft were real, that they were not a pretext to discharge these employees for refusing to submit to a private interview and, therefore, the order in that case was to the employer, cease and desist from insisting on a private interview when the employee requests representation but since the discharge was not for that reason, but for alleged theft,

that question was for the arbitrator.

QUESTION: But Mr. Dunau, the employer, in your submission, cannot refuse to allow the second person to be present at the interview. He must either accept the second person there at the interview or not have the interview.

MR. DUNAU: That is correct, your Honor.

QUESTION: Right.

MR. DUNAU: That is the alternative.

QUESTION: Right.

MR. DUNAU: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Jenkins.

ORAL ARGUMENT OF JOHN E. JENKINS, JR., ESQ.,

ON BEHALF OF RESPONDENT

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

This case raises an interesting question before the Court to determine the scope of the right of an employee to representation in his dealings with management.

The facts of the case are simple. The issue in the case I think everybody agrees on and the underpinning legally of where the authority lies to order such a right by an employee is not in dispute in Section 7 of the National Labor Relations Act as it has been amended.

Now, a number of situations exist with respect to the possible scope of representation rights of an employee

under Section 7 of the act.

There is nothing in the wording per se of this section of the act which really throws any direct light on the subject.

For example, there is nothing in Section 7 that says an employee shall have the right to a representative in these situations or spells it out. The act simply says that an employee has the right to engage in collective activity, concerted activities is actual word of the statute for purposes of collective bargaining and other mutual aid and protection.

Now, the word "concerted" of course, has a technical meaning that has been considered by a number of courts and it has generally been held to mean group activities for representation activities that the group as a whole was interested in.

QUESTION: What about the language "through representatives"?

MR. JENKINS: To engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection through representatives. Yes, your Honor.

The question here is whether or not the word "concerted" embraces one employee such as we have in each aspect of this case or in many of the cases that have been

held, whether that"concerted" applies to them with respect to their own individual rights with respect to an employer at a time.

For example, any disciplinarian situation involving one employee. Does that involve a concerted or group activity?

Now, it is clear that where a group activity is involved, then the employees have a right to representatives but it does not say, as I read the act here, that an employee has the right to a representative to handle his own personal individual problems which may arise on a one-to-one relationship between himself as an employer --

QUESTION: Well, I think we had better look at the statutory language. It may be rather important to look at it a little more carefully.

The representative language has to do only with collective bargaining.

MR. JENKINS: That's right.

QUESTION: It is a right to bargain collectively through representatives of their own choosing. As I understand it, that is not involved here.

MR. JENKINS: That's correct, your Honor.

QUESTION: What is involved here is the phrase or the clause, "And to engage in other concerted activities for the purpose of collective bargaining or other mutual

aid or protection.

MR. JENKINS: Yes, your Honor.

QUESTION: That is the clause, isn't it?

MR. JENKINS: Yes, your Honor, that is the clause which we all agree that if there is a statutory right to the employee to have a representative, it flows from that specific language and the specific phrase in Section 7 --

QUESTION: And the specific phrase is, "Engage in other concerted activities for other mutual aid or protection."

MR. JENKINS: Yes, your Honor.

QUESTION: Is that it?

MR. JENKINS: That is right. We all agree that if there is the power or the right, it comes from those specific works.

Now, it is interesting, I think, if you look back over the history of this situation, that no court, and certainly not the Labor Relations Board, has ever said that on the basis of that language, an employee has the right to a representative with him at all times and in all places under all circumstances.

In other words, no one has ever contended that that language there gives a broad, across-the-board right to an employee to have a friend with him or to have a union representative with him under any circumstances when

management talks to him.

Down through the history, up until quality came along, over a period of almost 25 years, the rights in this regard were exceedingly limited. A dichotomy had developed by virtue of board decisions.

A division of this whole, if you please, which would -- the "whole" being the right of an employee to have a representative with him at any time, under any circumstances -- no one said that was the status of the law. No one interpreted Section 7 that way.

But they carved off one piece of that whole and said that where there is an interview taking place between employer and employee, in that situation and where it is not an investigatory, a fact-finding type of interview; in other words, an interview is first and then contracted further to a particular kind of interview, one that was not investigatory or fact-finding but one which had to do with the imposing of discipline, a decision by an employer to an employee, passing judgment upon his case of a problem.

And in that very limited area, in those circumstances, an employee had a right to have a representative present to him in those particular times.

Now, whether this is a dichotomy that is based upon any real, rational reason or not is something that is debatable but, nevertheless, that is the way the law

developed for some 25 years up until Quality came along.

QUESTION: He was, you concede, entitled to have somebody of his own choosing under what conditions?

MR. JENKINS: Under -- when the investigation or the purpose of the conference was to pass judgment on him, when it was disciplinary in nature, when he was being brought in to say, you are suspended for two days. You are now receiving a verbal warning. You are being discharged.

QUESTION: As contrasted with an investigating interview.

MR. JENKINS: Yes, your Honor.

Now, the reason why it should logically have developed in the law this way I think is understandable.

QUESTION: What was this interview for?

MR. JENKINS: We don't know, your Honor. There is no way here that we can --

QUESTION: Wasn't this interview to find out why you sassed that -- wasn't that what it was for?

MR. JENKINS: This is what Mrs. -- well, let me say this, your Honor, first -- and the reason I say we don't know for sure, first of all, the employee involved here did not testify at the hearing. She was, I understand, quite ill at the time.

QUESTION: Brain operation.

MR. JENKINS: Pardon, sir?

QUESTION: She had had a brain operation.

MR. JENKINS: Yes, sir. So we don't know what she thought about the situation.

Secondly, we don't know for sure what happened in the incident up on the floor. The only thing that we do know is that -- the light that Mrs. Gerlach throws upon it is that she was concerned about the sassing incident. That is the only evidence that we have.

QUESTION: That is all we have.

MR. JENKINS: We have evidence of --

QUESTION: Well, what was the interview about, other than that?

MR. JENKINS: Well, it certainly -- we can speculate that it could have been because work was disrupted. There was comment in the evidence about that up there. The employee had stopped and several other machine operators --

QUESTION: Couldn't that lead to discipline?

MR. JENKINS: It could, I would say.

QUESTION: Well, why didn't that come into that category you were just talking about?

MR. JENKINS: Because there had been no decisions on the part of the company at that time to impose discipline. We don't know what the result would have been. How do we know what -- if Mr. --

QUESTION: Well, if she had come in and said, "Yes, I sassed out and I did it for the purpose of wrecking the business," then she would have talked herself right out of a job, wouldn't she?

MR. JENKINS: The history of --

QUESTION: Wouldn't she?

MR. JENKINS: We don't know because I think the history is interesting here. She had been an employee of this company for many, many years and the evidence undisputed was that she had gone on her own, sometimes three and four times a day for a conference with Mr. Gerlach the president.

Evidently, there was quite a rapport or at least a facility of communication between the two, one-on-one in his office and we don't -- I don't know what Mr. GErlach, if he had the decision, I think it would have been what he would have done in this situation.

He may have disciplined her. He may have said, get on back to work and not disciplined her. We don't know because there is no evidence here as to what she would have done. We were not at that stage in this case. We were in the stage where she was being given the right to come before him and give him her side of the story.

QUESTION: She wasn't given the right. She was ordered.

MR. JENKINS: Yes, she was ordered. She was both ordered --

QUESTION: Is that what you call gives somebody the right to do something?

MR. JENKINS: It is a combination of both. If I were in Mr. --

QUESTION: And she was fired for not doing it.

MR. JENKINS: She was --

QUESTION: So that isn't giving anybody a right, to get fired.

MR. JENKINS: She was fired, not for what she said to him, but the fact that she would not discuss it with him at all without a representative present, which gets to her legal right in this case, as to whether she was legally right or not.

QUESTION: Mr. Jenkins --

MR. JENKINS: Yes?

QUESTION: There is a dichotomy, I think you suggested --

MR. JENKINS: Yes.

QUESTION: Between a state of investigation and a state at which discipline is possible.

For example, supposing the theft in the plant and the employer decides he wants to talk to everybody and he calls them up one by one.

MR. JENKINS: Yes.

QUESTION: I gather that, to you, would be the investigation stage and one would not be entitled to have a fellow employee with him.

MR. JENKINS: That, I understand, is the position of the board and the courts at present.

QUESTION: Well, now, where does the line -- where does it cross the line so that the employee is entitled to have some assistance?

MR. JENKINS: It is a very fuzzy line, your Honor, and it has been spelled out on a case-by-case basis only with general terminology and the terminology is that where the procedure is at the point where the decision by the company has been made as to what it is going to do -- in other words, its ultimate disposition, the theft problem or whatever, at that point, if it calls the employee in, the employee has a statutory Section 7 right -- or under some other Section, it is not clear -- to have a representative present.

But up until that point, they do not. And the reason and the rationale for that I think is clear.

Management and managing a business needs a free flow of information. We hope that we do not get, in the development of our labor law, to a situation where an employer or an employee cannot talk directly to each other

on some matters.

And I guess the problem here is to decide whether or not there are some in which there is an absolute right to representation and there are others when there are not.

Certainly, if we are in a situation where an employer says, "How's the weather outside today?" and the employee says, "I'm not going to answer until I get my union representation," everybody would agree that would be an absurdity.

And then we move from there on closer to the involvement of the employee --

QUESTION: He wouldn't have the right to fire him.

MR. JENKINS: Pardon?

QUESTION: You say, how is the weather outside? And he says, it is none of your business, you wouldn't have the right to fire him, would you?

MR. JENKINS: I would think not, your Honor.

And the --

QUESTION: Do you see any analogy, even remote, Mr. Jenkins, between the Argersinger case, which is in a totally different field, in the criminal field, where this Court held that if a penalty of confinement is to be imposed, there must be a lawyer.

Now, that does not mean that a case -- a trial is invalid if it is held without a lawyer. But what it does

mean is that the judge elects to go ahead without counsel, without appointing counsel, where there is the potential for confinement. He may not make a valid judgment of confinement at the end of that proceeding.

Is there any analogy that you see here at all?

MR. JENKINS: I don't think that I see the apparent analogy, your Honor, but I do not think that it will work in the industrial relations area because here you would have to, in the industrial relations situation, you would have to presuppose what the probable end result of the investigation procedure was --

QUESTION: That is what the judge has to do under Argersinger.

MR. JENKINS: Maybe in a criminal situation but in the criminal situation, you reach a conclusion before the court and in the labor situation, you don't.

There are, as a for instance, an employee gives information to the company and the company then determines at a later time to discharge the employee. The employee, if he has the union representation, can arbitrate the reasonableness of that. There is a step beyond the court available to him.

But here, in industrial life -- and I am not sure that, while the job rights are quite important, I am not sure they are also equated with a person's civil rights and

liberties as they would be in the case that your Honor suggests.

The courts have generally rejected the analogy between the Escobedo-type of doctrines which have attempted, in some instances, to be applied to the industrial fields. They are simply talking about rights of different significance and order and do not feel they are proper analogies.

QUESTION: Do I understand, Mr. Jenkins, that your submission would be -- take this theft case again -- and the employer after an interview with no representative or assistant present concludes that this is the thief. He may then, without committing an unfair labor practice in that situation, discharge the employee then and there and leave the employee to the remedy of a grievance.

MR. JENKINS: Yes.

QUESTION: And if the collective bargaining agreement calls for it, other arbitration. Is that it?

MR. JENKINS: That is right. And then the question of just cause, which is almost the universal standard --

QUESTION: Then, I take it, you would contrast that, would you, to a situation where he begins, the employer does, with a suspicion -- perhaps more than a suspicion that this is the thief. Now, in that circumstance would it be an unfair labor practice if the employee insisted on having the assistance of another -- of a fellow employee?

And he refused to allow the assistance?

MR. JENKINS: The distinction of the courts, as I understand it --

QUESTION: Let me ask you, what would you do in the situation where he started out with the suspicion that this was the thief? And the employee wanted someone with him for the interview?

MR. JENKINS: I do not believe that the distinction in the state of the mind of the employer should be controlling in any event. I don't think this dichotomy that the Labor Board has developed between when you are in the investigatory phase and when you are in the decision or disciplinary phase is a real one.

This is the practitioner speaking who has to make practical applications at the lowest level at the plant and we are looking for clearcut rules and we don't like the rules of laws to be based upon the subjective state of mind of the employer.

Let me draw an analogy, if I can. I was interested in the discussion this morning on Gissel. Gissel --

QUESTION: You argued it.

MR. JENKINS: Gissel was my client and I was here on that and I recall how astounded we were when the Gissel case was argued that the brief of the board, for the first time in this Court on the question of the good faith doubt

took a totally different view in their brief here than they had ever before and they backed off of that good faith doubt because, simply, it doesn't work in practice and our problem with Quality here is exactly the same.

We see the board in Quality moving into the same legal psychological realm with respect to Section 7 rights here as they did under the good faith doubt.

In Gissel they, prior to that, they were psychoanalyzing the employer to find out if he, between his ears, had a good faith doubt.

Here, even worse than that, we are psychoanalyzing the employee and we are making the employer's unfair labor practice depend upon an assessment of the psychological or beliefs of the employee because the exception that the board would carve out here in Quality, as I understand it, says this:

That even if the interview is investigatory and it is not disciplinary, even at that stage, we are going to widen the circle a little further and what are the conditions of that?

We are going to widen the circle an inch further to cover the situation where the employee, between his ears, thinks that there may be reasonable probability of discipline at the end of the line.

QUESTION: Well, I gather then, Mr. Jenkins, your

submission is that there can never be an unfair labor practice in the refusal to permit, when the employer wants an interview with an employee -- the employee to have a union agent or anyone else with him.

MR. JENKINS: Section --

QUESTION: Is that the answer?

MR. JENKINS: The answer -- your Honor, the answer is, yes.

QUESTION: There are no circumstances under which, unless the collective bargaining agreement provides for it.

MR. JENKINS: Yes, your Honor, and I think this follows from the plain reading of Section 7 because it doesn't provide for it in there.

But let me just hasten to add that that is not the position that the Labor Board has taken. They have taken -- there are some instances, namely, when discipline is involved and the courts have upheld them with respect to that right.

But I think the problem here in this decision, to those of us who are practitioners, is that we have a situation where the scope of the employee's rights have been spelled out in case after case over this period of time.

QUESTION: Are you satisfied with -- would you

be satisfied with the rule that the employee may have disciplinary -- may have help with him if it is disciplinary?

MR. JENKINS: No, I would not, your Honor.

QUESTION: And --

MR. JENKINS: I don't feel that Section 7 provides for that and I think that --

QUESTION: Then that would turn on what an employer anticipated doing?

MR. JENKINS: Yes, your Honor, and it would put us in the position of trying to decide, well, what is the end result?

And suppose your Honors were the employer. Most of these investigations start out when the -- the purpose of the investigation is to find out what the end will be.

QUESTION: But that was the rule for a long time, wasn't it?

MR. JENKINS: Pardon, sir?

QUESTION: Wasn't that the rule for quite awhile, that if discipline is involved, he is entitled to representation?

MR. JENKINS: Yes, your Honor, that is the rule now with the board and the courts as I understand it.

QUESTION: Well, never --

MR. JENKINS: Pardon, sir?

QUESTION: Never of any decisions of this Court

that I know of.

MR. JENKINS: That is why we are here, your Honor, I --

QUESTION: That's what I thought.

MR. JENKINS: I don't --

QUESTION: That's what I thought and I want to be clear that I understand you. You are not -- you are not arguing upholding this distinction that the board has made, are you?

MR. JENKINS: No, your Honor, I am not. I think it is a distinction without reality.

QUESTION: You say, in the absence of a collective bargaining agreement providing otherwise there is absolutely no right of representation by an employee for an interview with the employer.

MR. JENKINS: Yes, your Honor.

QUESTION: That the right attaches only under a different provision of the act if, as or when there is a grievance.

MR. JENKINS: Yes, your Honor.

QUESTION: Is that correct?

MR. JENKINS: That is correct because -- and I think that we may suppose also that this is a view that Congress may take of it, at least so far as the extension proposed in this act.

QUESTION: By grievance, I mean, if, as or when there has been some sort of disciplinary action.

MR. JENKINS: Yes, your Honor.

QUESTION: Afterwards, then.

MR. JENKINS: That is correct.

QUESTION: The board has gone farther, now, to say that whether discipline is involved or not, even though it is investigatory, he is entitled to representation.

MR. JENKINS: Yes, your Honor. They have gone the extra inch or further than that now to raise that and I suppose we might presuppose that the next step would be, you can have a representative person any time.

QUESTION: The Court of Appeals didn't go as far as you are suggesting, did it?

MR. JENKINS: They -- no, your Honor, they didn't.

QUESTION: Well, of course, they denied enforcement of the board's order -- or did they? -- yes.

MR. JENKINS: That is correct.

QUESTION: They denied --

MR. JENKINS: They denied enforcement.

QUESTION: So I gather you think that denial is something you can support without cross petitioning?

MR. JENKINS: Yes, your Honor, I do because I think that for the purposes of disposition of this case, the position that the Court of Appeals took is sufficient.

But I think that the Court of Appeals still would allow a certain area of representation that I feel is not spelled out clearly in this act here. So you find a -- it is a question, of course, of where you are going to draw the line on how wide and under what circumstances you are going to say that the law requires that an employer permit an employee to have a representative present with him.

QUESTION: Do you regard the Fourth Circuit's utterances on this other area as dictum in the case?

MR. JENKINS: I don't -- I think so, your Honor, because I don't think they were necessary to dispose of this case.

QUESTION: Mr. Jenkins --

MR. JENKINS: Yes, your Honor.

QUESTION: This red brief is yours.

MR. JENKINS: Yes, your Honor.

QUESTION: On page 8, the heading says this --and you have me completely confused -- "The board's decision herein is in derogation of the decisions of the United States Courts of Appeal, including this Court." And, following that, "Over 25 years ago, this Court held that there is no right to have a union representative, citing this Seventh Circuit case."

MR. JENKINS: Yes, I --

QUESTION: You don't mean that, do you?

MR. JENKINS: The grammar is not accurate, of course, your Honor. That is referring to the Seventh Circuit.

QUESTION: Well, did you lift this out of a Seventh Circuit brief or something?

MR. JENKINS: Yes, part of it, your Honor.

In closing, I'd like to make the comment that it would seem that the exception or the provision for representation which the petitioner here is arguing for and which the Labor Board requires, namely, representation where the employee has reasonable cause to believe that disciplinary action may result, sets up a criteria of the existence or non-existence of an unfair labor practice by an employer upon the fears of an employee.

If the employee fears that he may be disciplined, no matter how slight, then, under the board rule, he is entitled to representation but it is the employer who must make a decision without the facts as to whether or not this fear is reasonable or whether or not this fear is justified.

And I do not think the flowing of statutory rights of representation should be present or non-existent, depending upon whether an employee fears a certain result or whether he is completely without fear on the subject.

QUESTION: I gather, Mr. Jenkins, essentially your submission is that -- in Section 7 -- that this is not

a concerted activity within Section 7.

MR. JENKINS: That is correct, your Honor. Exactly.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dunau, I think your time has expired.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 1:38 o'clock p.m., the case was submitted.]