ORIGINAL

In the

Supreme Court of the United States

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TRANS WORLD AIRLINES, INC. PETITIONER, V. LARRY G. HARDISON, ET AL., RESPONDENTS. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., PETITIONERS, V. LARRY G. HARDISON, ET AL., RESPONDENTS.	)	No. 75-1126 No. 75-1385

Washington, D. C.
March 30, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

TRANS WORLD AIRLINES, INC., Petitioner, v. LARRY G. HARDISON, et al., Respondents.	No. 75-1126
--- and --- INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al., Petitioners, v. LARRY G. HARDISON, et al., Respondents.	No. 75-1385

Washington, D. C.,

Wednesday, March 30, 1977.

The above-entitled matters came on for argument at 11:45 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEORGE E. FELDMILLER, ESQ., Stinson, Mag, Thomson, McEvers & Fizzell, Post Office Box 19251, Kansas City, Missouri 64141; on behalf of Petitioner TWA.

MOZART G. RATNER, ESQ., 1900 M Street, N. W., Washington, D. C. 20036; on behalf of Petitioners IAM&AW.

WILLIAM H. PICKETT, ESQ., Pickett & Midkiff, 1801 Traders National Bank Building, 1125 Grand Avenue, Kansas City, Missouri 64106; on behalf of the Respondents.

NATHAN LEWIN, ESQ., 2555 M Street, N. W., Suite 500, Washington, D. C. 20037; on behalf of the National Jewish Commission on Law and Public Affairs as amicus curiae.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1126, TWA against Hardison and 75-1385, Machinists Union against Hardison.

Mr. Feldmiller, I think you may proceed now.

ORAL ARGUMENT OF GEORGE E. FELDMILLER, ESQ.,

ON BEHALF OF PETITIONER TRANS WORLD AIRLINES, INC.

MR. FELDMILLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case, which is here on certiorari to the Eighth Circuit, involves two general issues:

First, the extent of the protection under the establishment clause, in so far as whether a person can, in effect, be taxed or forced to spend money or be deprived of work coverage or nondiscriminatory work rules so that another may practice his religion.

Second, the proper application of two provisions of the 1964 Civil Rights Act, in the context of Rule 52(a)'s clearly erroneous requirement.

The first provision under the Civil Rights Act is the 1972 congressional amendment, Section 701(j), and its forerunner, the 1967 EEOC guideline, both of which define religion and require an employer to reasonably accommodate all aspects of his employee's religious observance and practice, as well as beliefs. And I emphasize all beliefs.

Unless that employer can demonstrate an undue hardship.

The second provision of the 1964 Civil Rights Act is Section 703(h), and that declares that "it shall not be an unlawful employment practice for an employer to apply different terms of employment pursuant to a bona fide seniority or merit system, provided that such differences are not the result of an intention to discriminate."

And, incidentally, there is no evidence in the record of any intention to discriminate.

After a full-blown evidentiary hearing, in which seven witnesses testified, the district court dismissed Mr. Hardison's religious discrimination claim and entered its findings of fact that TWA had reasonably accommodated Hardison and that any further accommodation would have constituted an undue hardship. Judge Oliver found that many of the stipulated facts were irrelevant, and he referenced all of his findings to the transcript testimony of the live witnesses, and he stated that he was "impressed with the men who were on the line handling the problem."

The Eighth Circuit disagreed and decreed that Judge Oliver's findings of fact were clearly erroneous.

Now, the basic facts of this matter can be succinctly and summarily stated. Hardison was employed at TWA's major overhaul base in Kansas City, Missouri. That base operates

24 hours a day, 365 days a year. And at the time he was employed, in 1967, Hardison indicated that he would work shifts, including weekends. And upon his employment, he became a union member, and he functioned in accordance with the bona fide seniority rights that govern all job assignments under the applicable collective bargaining agreement.

Now, thereafter, in the spring of 1968, Hardison began studying the religion known as the Worldwide Church of God, and in April he wrote his supervisor, Mr. Everett Kussman, and he stated that he wanted special time off from Friday sunset to Saturday sunset, because he sincerely believed that that was the Sabbath under his new religion.

Mr. Kussman immediately initiated a meeting with Mr. Hardison, to talk about this matter. Kussman agreed to excused time off for seven religious holidays which Mr. Hardison had, none of which were the same as the contractual holidays under the collective bargaining agreement.

Mr. Kussman also agreed to the union seeking swaps for days off, and an attempt to find another job. The report was made to Mr. Kussman that Mr. Hardison's day-off requirements were too difficult to handle.

QUESTION: To find another job with the same employer?

MR. FELDMILLER: Yes, with the same employer. Thank you.

Hardison was generally able to avoid Saturday work

from April, the time he first met with Mr. Kussman, through March of 1969, or up to March of 1969. He did, in that interim, work some voluntary overtime work, on his Sabbath.

Now, after a second meeting in September of 1968, between Hardison, Kussman and the union steward, Hardison was still able to avoid the Saturday work and he was fully accommodated in his religious practices, because Mr. Kussman had been able to agree with the union consent that he could have his seven special holidays off.

However, in December of 1968, Hardison voluntarily transferred to a different shift in a different building, which was governed by different seniority requirements and seniority lists.

At that time he left the security of being halfway up the ladder in seniority to a position where he was second from the bottom. When he made this transfer, he knew that he could expect some work on a Saturday in the event of a vacation problem or the employee junior to him might be ill or something of that nature.

And at the time -- well, he had no Saturday work up to March of 1969. At that time, Mr. Kussman, the TWA Supervisor, noticed a schedule change had been made which would require Hardison to work starting Saturdays on March 8th.

Mr. Kussman therefore initiated a meeting with Mr. Hardison and brought in the union steward, Mr. Tinder, to

see what roles or aspects of accommodation could be made. Mr. Kussman once again agreed to waive the seniority obligations upon TWA under the collective bargaining agreement, but the union steward did not believe that that could be done, and refused to do so.

Mr. Hardison offered to work six days a week, and that was acceptable to TWA, but it was unacceptable to the union because of the 40-hour work rule, that any work over 40 hours was subject to the overtime bidding rights of all other employees.

The aspect of whether or not Hardison may have been able to work four days a week may well have been discussed at this meeting. Mr. Kussman did not believe that he could allow Mr. Hardison to have a four-day workweek, because he needed people to work in TWA's continuous operation requirements, he was the only person scheduled to work on the job on Satursdays after March 8th, and this was a job that had to be filled in order to respond to any emergencies which might occur at the overhaul base.

Mr. Hardison was not satisfied with the results of the March 8th, 1969, meeting, but he did not file a grievance, although he knew he could do so.

QUESTION: Mr. Feldmiller, before you leave that meeting --

MR. FELDMILLER: Yes, sir.

QUESTION: -- was there discussion at that meeting of a possible swap?

MR. FELDMILLER: Yes, there was a discussion of general swaps, a change of jobs, perhaps him going back to his earlier section.

QUESTION: Would you explain to me why the swap wasn't feasible? And the reason I ask the question is that apparently it must have been assumed, when the company indicated willingness to consider giving him his special holidays, that there would probably be trades, why couldn't there have been a swap here?

MR. FELDMILLER: Well, the basic difference between the holiday situation, the seven-holiday situation, and the swap on the Saturday is governed by the realities, I think, of the situation.

For example, TWA had a contractual obligation that it would work a minimal overtime or minimal weekend force at its overhaul base on the weekends. And also the people with the high seniority just preferred not to work on Saturdays. So we had a very limited number of people that could be -- that were realistically available for TWA at this time.

QUESTION: Well, weren't there -- I think Judge Ratner says there are about 200 people that could have done the work.

MR. FELDMILLER: There may have been more than 200

people who could have done the work, but none of those people were available within the terms of the collective bargaining agreement, because the collective bargaining agreement did not provide for just mere swaps between employees.

QUESTION: Did it prohibit swaps?

MR. FELDMILLER: Yes, sir. Every time, Mr. Justice Stevens, there was an opening in a job, that opening had to be subject to the bidding rights of all other employees.

QUESTION: Well, I understand it, but why couldn't -- supposing he had said, "I've got a friend that will fill in for me", and then the answer would have been, "Well, he can't unless you open the job for bidding."

MR. FELDMILLER: That's right.

QUESTION: Well, why couldn't that have been done?

MR. FELDMILLER: TWA was willing to do that, and the union was willing to do that, but apparently the union did not believe that the bidding would have been available, or would have rendered Hardison any relief. There were no jobs available within the seniority framework at that time.

QUESTION: Well, what happens in the company, say somebody comes in and says, "I've got to go to the dentist next Friday, can I trade with somebody"; is there any way to handle a problem like that?

MR. FELDMILLER: There is not.

QUESTION: People just never switch at TWA?

MR. FELDMILLER: Seniority in this situation, and this distinguishes the case from many of the other cases that have been decided, under the terms of this seniority agreement, there were no situations --

QUESTION: What provision in the collective bargaining agreement forecloses a swap?

MR. FELDMILLER: That would be the provision that all jobs, all shift assignments are governed by the seniority rights of all employees. That would appear in --

QUESTION: If I understand it, all that means is that if you find a candidate for a swap before it can be effectuated you've got to say, "Does anybody with more seniority want to do it?"

MR. FELDMILLER: That's right.

QUESTION: But why does that prohibit trying to do it?

MR. FELDMILLER: Well, I don't think -- I don't think that that would -- that it was not tried in the sense that TWA authorized that to be done. It is the union steward that does this, the union steward maintains the seniority list, and he is the one that goes through the list, makes the contacts to fill the jobs. Our hands were really tied in going out to the employees. If we did, we would be subject to the union understandably saying that perhaps you're out there trying to coerce volunteers, when, in fact, we would not be doing that. It could lead to very substantial problems

with the union relationship.

We were very willing for that to be done, we agreed that it could be done. And the union did not believe that it was proper in this case to do.

I don't know their exact reasons. Mr. Ratner might be able to explicate further on those.

At any event, when Judge Oliver saw the witnesses and when he rendered his decision, he took into account the fact that TWA had to consider the rights of other employees. The problems of employee morale and grievance problems in the event that TWA went further without union consent.

He also took into account that all religious beliefs, it would be burdensome upon the employer to have to take into account all religious beliefs of all employees. He thought that seniority was an important right, and that under Section 703(h), if that was not controlling it at least indicated the congressional intent to protect bona fide seniority rights and in fact Judge Oliver found that it was coincidental that the seniority provision in this case acted to in any way hamper Mr. Hardison's ability to work.

QUESTION: Mr. Feldmiller.

MR. FELDMILLER: Yes, sir.

QUESTION: Getting back again to the factual framework of this case, you told us that this place of employment operates 365 days a year.

MR. FELDMILLER: Yes, sir.

QUESTION: That, of course, includes Sundays, and, as we both know, most people observe the Sabbath on Sunday.

MR. FELDMILLER: Yes, sir.

QUESTION: What provision has the company and/or the union made, if any, to accommodate the religious views of those who observe the Sabbath on Sunday?

MR. FELDMILLER: The people who would observe the Sabbath on Sunday, Mr. Justice Brennan, would have been treated exactly like Mr. Hardison was. It would have been extremely difficult, I think in our society, that if the people who do worship on Sunday wanted off, it would be very difficult for a company like TWA, that has to operate 24 hours a day, to serve the public and to fulfill its functions, to continue to operate.

QUESTION: Does the record show anything on this subject?

MR. FELDMILLER: No, it does not, except --

QUESTION: Of accommodation of those employees who observe the Sabbath on Sunday?

MR. FELDMILLER: No, it does not.

QUESTION: No --

MR. FELDMILLER: Except the fact that they would have been treated exactly the same. That is not in the record, but they would have been treated exactly the same as Mr.

Hardison.

QUESTION: But the record just contains nothing on this subject?

MR. FELDMILER: No.

We believe that the Court of Appeals violated Rule 52(a) and tried the matter de novo. We think that this is an important consideration in this case, because the Court of Appeals really misconstrued the record, we believe, in assuming and relegating TWA the role of a Pontius Pilate. We think that the record is clear that Mr. Kussman did his very best, as an individual and as a person, not just because it was mandated by law, but he did his best to go in there and work it out with Mr. Hardison, at the same time protect his relationship with the union that he has to work with on a day-in/day-out basis.

We also think that the Court of Appeals made some serious factual mistakes. For one thing, it said it reviewed the full record. In fact, it did not do that, because the full record was not filed in the Court of Appeals. The full record now is on file at this Court. The only record that the Court of Appeals had was the trial appendix. And while that is a full appendix and relatively full, they still did not have the entire record to review in purporting to reverse Judge Oliver's findings as clearly erroneous.

QUESTION: Well, did it have all of the evidence and

all of the stipulations?

MR. FELDMILLER: Yes. It did not have all of the evidence, it had all of the stipulations which -- many of which -- Judge Oliver found to be irrelevant, and it had a great deal of the testimony, it was a very thorough --

QUESTION: Everything that the parties thought the Court needed to pass on the case.

MR. FELDMILLER: There were some things, according to the Federal Rules, that were not placed in the record, that were important; but they did not call upon --

QUESTION: But nobody filed them with the Court of Appeals.

MR. FELDMILLER: -- they did not call upon, the Court of Appeals nor the parties, called upon the district court to apparently send up the rest of the record.

We were under the impression that the entire record was submitted, and we were so informed by the district court and the Court of Appeals Clerk, but when I got the record for this Court, the Court of Appeals called me and said, "We're sorry, Mr. Feldmiller, we made an earlier mistake and we did not have the entire record."

Thank you.

MR. CHIEF JUSTICE BURGER: We will resume there are one o'clock.

[Whereupon, at 12:00 noon the Court recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Ratner, you may proceed whenever you're ready.

ORAL ARGUMENT OF MOZART G. RATNER, ESQ.,

ON BEHALF OF PETITIONERS IAM&AW

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

I should first like to answer Mr. Justice Stevens' question concerning why these jobs couldn't have been put up for bid.

They couldn't have been put up for bid because neither party to the potential swap asked that his job be put up for bid. Neither was willing to vacate his job. Hardison testified at pages 83 and 84 of the Appendix that he knew all about the procedure, it was perfectly possible for him to get into that midnight shift where he wouldn't have to work on his Sabbath by bidding. But that job was not open, because the fellow on the midnight shift hadn't indicated any willingness whatever to leave it. In fact, Hardison said he had no idea whether the fellow would be even willing to swap.

There had been no application by that man to leave his job, nor had there been one by Hardison. That's what triggers the bidding, is the job vacancy. The record is clear that there was no job vacancy. One could have been created,

had either one of these two employees chosen to create one, by telling the company they want to leave it. Neither of them did.

QUESTION: Mr. Ratner, didn't that testimony relate to more or less permanent exchange of jobs as opposed to, "I can't work this Friday, is there somebody I can trade with?"

MR. RATNER: The difference is between a "I can't work this Friday", which is treated as an emergency situation and which sometimes is worked out, and the recurrent or permanent situation, which is clear must be handled by the bidding procedure.

There is testimony that occasionally, through the Union Relief Committee, things were worked out. But there is no testimony that in any of those situations the seniority rights of any intervening employee were impaired. In short, even a swap, so far as this record shows, could not have been accomplished if that swap had been over the objection of some other employee who would have preferred to work that shift.

Now, here you had as many as 200 potential applicants for this job, and it was obviously impossible for a continued period, here it was a minimum of three weeks and basically it was far more than that, because Hardison was a permanent convert, presumably, to this religion, he would constantly, in any job that he had where he remained the senior

man, come into these situations where he would be unwilling to perform, to meet the job requirements of that job, which was attendance at work on his scheduled workday.

The company treated it, in so far as the record shows, nondiscriminatorily treated it as a completely different situation in a one-day swap. The holidays they were willing to do. They did. Nobody's seniority rights were impaired.

QUESTION: Does the record tell us how they were going to solve the holiday problem?

MR. RATNER: The record does not tell us how they were going to solve the holiday problem, except that they did solve the holiday problem -- well, in a sense, it tells us. It tells us that he was going to have to be available for work on the Christian holidays. He might or might not have had a chance to do, or been obliged to come in and work those holidays, depending on whether the people senior to him in seniority wanted the chance to work those holidays.

QUESTION: I thought it was a volunteer situation.

MR. RATNER: I'm sorry?

QUESTION: Isn't it a volunteer situation on the holidays?

MR. RATNER: No.

QUESTION: That somebody voluntarily gave up, or was persuaded to?

MR. RATNER: Well, they were persuaded or induced by

extra payments, to come in and work on the holiday. He would have gotten extra pay for working on the holiday.

QUESTION: Yes. Well, what would happen if two men, one wants Saturday and one wants Sunday, and they agree that any time it comes up, "we'll switch"?

MR. RATNER: No, that can't be done, you're violating the seniority rights of all the people with seniority over both of the swappers.

QUESTION: Right. I thought it was too simple.

MR. RATNER: To avoid the necessity of passing on the --

QUESTION: Let me follow up with one other question there.

MR. RATNER: Yes, sir.

QUESTION: If someone senior objected to that, then it would mean you just swap with somebody else, wouldn't it?

MR. RATNER: No, it wouldn't be. If somebody objected to that, that somebody would bid into that job, and Hardison, if he had bid out of it, would be out of work; he would have no job. There was no place for him to go. Unless he had the seniority to take over the job of the man who took his job, which he didn't have, and wouldn't have, because he was low man on the totem pole.

And it's not his job to swap, he doesn't own that job.

QUESTION: So if a fellow gets a toothache and has to go to the dentist, it's got to be an emergency is what you're saying?

MR. RATNER: No. The fellow who's got a toothache and has to go to --

QUESTION: There's no way to solve it.

MR. RATNER: -- the dentist is probably going to get sick leave.

QUESTION: I see.

MR. RATNER: There is probably that kind of emergency, not from choice.

QUESTION: And if a cousin comes in from out of town, once in a long time, wants to see him that one day and trade with somebody, he just can't do that?

MR. RATNER: Your Honor, the one day temporary situation is handled intelligently, sensibly, regularly in this plant, it was handled for Hardison. This man made a permanent conversion to a religion that required him to be off every Saturday.

QUESTION: Yes, but the problem would only arise when somebody else in the department went on vacation. His regular -- he didn't have the problem on his own regular assignment, did he?

MR. RATNER: Well, a three-week period of time is more than the company properly felt could be treated as an

emergency under the collective bargaining agreement. They were right. That's the way the agreement, properly construed, is.

QUESTION: Well, do you think, Mr. Ratner, that the statute that the Court of Appeals relied on here permits no adjustment whatever of rights under the collective bargaining agreement?

MR. RATNER: Well, you mean requires obliteration of rights under a collective bargaining agreement?

QUESTION: No, not --

MR. RATNER: Indeed, I think that the way the Court of Appeals construed it, it does so require, and I think that's what -- if the Court so construes it, that's what makes the statute a violation of the establishment clause. That's why I suggest the Court should not so construe it.

QUESTION: But your response to questions by Justice Stevens and Justice Marshall have been primarily, it seems to me, that there was just no way to do this under the collective bargaining agreement.

MR. RATNER: Right.

QUESTION: As if that were a total and definitive answer in this context.

MR. RATNER: It is a total and definitive answer in this context to the questions that I understood Mr. Justice Stevens to be asking, which was: was there a way to

accommodate this man by swapping shifts which would not have violated the collective bargaining agreement? To which my answer is no. If there is no such way, either without obliterating rights under the collective bargaining agreement or imposing costs upon the company, you confront -- unless you avoid it in the methods I'm about to discuss -- you confront squarely the establishment clause question: does this statute on which the court below relied empower the government to expropriate money from some people, money, property, liberty from some, and give the benefits of that expropriation to others in order to facilitate those others' practice of religion?

And, in addition, not only that, but does it allow the government to do this on a discriminatory basis? So that only religious causes are benefitted by this as distinguished from secular clauses?

I agree with Your Honor that if this company were shown to have a practice of allowing people to take Saturdays off during the football season, to go watch their sons play football, that's a good, legitimate secular reason. But if the plaintiff had shown that they did that and refused to allow Hardison to take Saturdays off because of his religious needs, that would violate the statute, constitutionally construed. And I urge Your Honors to construe the statute that way.

So that the obligation that imposes is a non-discriminatory obligation as between secular and religious needs, instead of a discriminatory one. Instead of a mandate to discriminate in favor of religious practices and observances at the expense of employers and competing seniority rights and liberties of other employees, it imposes a non-discriminatory obligation to treat requests for absences or for variances from uniform, normal, legitimate work-related work rules requiring attendance and job performance of all alike equally, not discriminatorily.

QUESTION: You say, then, that Congress could not by law provide that an employer had to adjust for a person who was a member of a religion which prevented him from working on Saturday, but -- unless it also required such adjustment for someone whose son was playing football or basketball and couldn't work on Saturday for the same --

MR. RATNER: I say that, Your Honor, yes, that's our position. I say that if we come to that, if the Court has to come to that, I see no escape from a holding that such a statute violates the establishment clause, for the reasons I've already stated.

One, it imposes a tax on the employer, on the union, and on the employees. If any principle is clear under the establishment clause, it is that government shall impose no tax, however small, to support religious activities. And it's

perfectly obvious that the tax that's being imposed on the employer is for no purpose other than to support Hardison's adherence to his religion, or religious activities.

QUESTION: Well, Mr. Ratner, let me just finish the thought and then I will leave the point.

I was trying to posit a case that would be cost-free, that it would be like a case in which one man normally works on Saturday, and he says "I'd like to have Saturday off to watch my son play football, and I have a friend over here who wants Sunday off to see the Redskins, and we want to trade." And you're telling me, as I understand it, the collective bargaining structure is such that that could not be done in this company?

MR. RATNER: Yes, Your Honor. That's what I'm telling you.

QUESTION: Yes.

QUESTION: It cannot be done if it conflicts with the seniority rights of someone who complains?

MR. RATNER: That, as I understand -- of someone what?

QUESTION: Of someone who complains about it.

MR. RATNER: Well, the union is there to see to it that the seniority rights of nobody in the plant are taken away from them, whether they complain about it or not. They are to be given the opportunity to exercise their rights under

that agreement. If a union doesn't do that, it's not performing its duty of fair representation. That's what it's there for, to see to it that nobody else's rights are impaired.

Now, I suggest to Your Honors that the nondiscriminatory construction of the statute that I have suggested comports with the entire thrust of Title VII, and that a contrary construction defeats it.

The purpose of Title VII is to eliminate discrimination on forbidden grounds, as the term "discrimination" is generally understood and as defined in Griggs; to excuse religious observers from compliance with neutral uniform attendance and work performance and scheduling requirements is to guarantee them superior not equal employment terms and conditions, and thus to discriminate in their favor.

QUESTION: But that's like what's in the Robinson-Patman Act conflicts with the Sherman Act, and yet they are both in the antitrust section of the Code. They both have been enacted by Congress, even if they do conflict.

MR. RATNER: Well, it's possible to read the statute, this statute, as conflicting with the whole rest of Title VII as compelling discrimination in the face of a retention of 703(j), which says you shall not prefer any employees because of their, among other things, religion; you shall not give them a preference. Of course, Congress could have left that, it could have left 703 unchanged, it

could have left, as it did, 701(a) unchanged, which talks only about discrimination. It could have done that.

The point is that I don't think this Court has to say that that's what Congress did. It doesn't have to, and if it can possibly avoid it, it ought to.

I'm going to have to reserve the balance of my time, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Pickett.

ORAL ARGUMENT OF WILLIAM H. PICKETT, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This cause is indeed a sad case, as is quoted in the Appendix at page 36. Mr. Hardison was willing to work any arrangement of job, shifts, assignment, any swaps, any hours. However, it was a sad case as the union decided in a letter, because he simply put his job -- he put his religion before his job.

The facts -- before I address some questions by Mr. Justice Stewart as well as Mr. Justice Stevens -- in this case show clearly TWA did absolutely nothing. We need not even consider -- but I most certainly won't address that question -- what did in fact TWA do in this case that was a reasonable accommodation. They would not allow Mr. Hardison

to work a four-day week. This would have been something that would have been able to comply with the reasonable accommodation provision; before you ever get to undue hardship, one must do something, the case law tells us.

QUESTION: If they allow Hardison, on religious grounds, to work a four-day week, can they deny a four-day week to any other employee?

MR. PICKETT: Deny a request for a four-day week?

QUESTION: Yes.

MR. PICKETT: The statute does not --

QUESTION: No, not the --

MR. PICKETT: Yes, they can. Yes.

QUESTION: They can deny it to others?

MR. PICKETT: Yes, that is correct. If, in fact, the law, which is the reasonable accommodation provision, which was the regulation promulgated under the '64 Act, was implemented because the EEOC found -- this was the second statute, there was a '66 and a '67 -- to in fact implement the provisions of Title VII, having to do with religion, which was held constitutional as to religion in Griggs, then, yes, they can if, in fact, the person who requests an accommodation, which Mr. Hardison, I submit -- the facts are clear in this case -- not only notified TWA quite a great deal ahead of time, but accommodated himself until the March situation. Then, in that case, Mr. Chief Justice, yes, they

should treat Mr. Hardison according to the statute.

Now, how is that? Not preferentially, it's reasonably. It is a reason situation. Less burden, I might suggest, than the business necessity doctrine which was given credence in Griggs. It is less of a burden on the part of the employer to show in fact an undue hardship after he shows a reasonable accommodation than it is simply to justify something that may have a discriminatory effect, due to religion.

QUESTION: To put it another way, does the record show that anyone else was given a four-day week?

MR. PICKETT: The record is absent as to that, because this was the first time this had ever came up, Mr. Justice Marshall, in TWA's history, at Kansas City.

QUESTION: Well, how were they discriminated against him?

MR. PICKETT: How they discriminated against Mr. Hardison, my client?

QUESTION: Yes.

MR. PICKETT: Well, they discriminated against him in a number of ways. TWA duty was to make a reasonable accommodation, at least to attempt to do so, absent any consideration of violation of the collective bargaining agreement.

QUESTION: What did Hardison ask for? What did he

ask TWA to do? That TWA did not do.

MR. PICKETT: Let him work his job, that he was assigned to drive the train and pick up parts and take back used parts, as long as it wouldn't cause him to do his job for TWA in violation of his Sabbath, which he had sincere beliefs that he could not violate.

QUESTION: And who else has that right at TWA, other than him?

MR. PICKETT: Any other employee. This was the first --

QUESTION: Well, how about the atheist?

MR. PICKETT: The atheist, likewise the statute --

QUESTION: Well, I guess he could take off any day he wanted.

MR. PICKETT: No, Your Honor. Sincerity --

[Laughter.]

MR. PICKETT: The atheist, you mean? Atheism is also encompassed, I believe, in the Young decision, which does in fact cover persons who in fact have no religion. The question is one the district court, as this Court has stated many times -- well, this Court hasn't stated it, it has had an argument before it --

QUESTION: I still think you're on the point of preference.

MR. PICKETT: It is a neutral application, Your

Honor, Mr. Justice Marshall.

QUESTION: How can it be neutral, when he says "I want something that nobody else has"? How is that neutral?

MR. PICKETT: He does not want something anyone else has, he wants --

QUESTION: Well, he wants Saturdays off; does anybody else have Saturday off?

MR. PICKETT: If they sought --

QUESTION: Does anybody else in this record have Saturday off?

MR. PICKETT: Those persons who are members of the seniority provisions who in fact bid for Saturday off, those persons, that amorphous group that the union says would --

QUESTION: Well, anybody in his category.

He had that before he changed his job, didn't he? He had that preference, didn't he?

MR. PICKETT: He had Saturday off for --

QUESTION: And he had seniority preference, too.

MR. PICKETT: That is absolutely correct, Mr. Justice Marshall.

QUESTION: And he surrendered that voluntarily.

MR. PICKETT: No, he did not surrender that.

QUESTION: He didn't surrender his seniority?

MR. PICKETT: He did not surrender it. He in fact, by way of application of his going to Building No. 2, found

that he was in less seniority, yes.

QUESTION: Well, didn't he know it before he went there?

MR. PICKETT: Yes, by all means. He was --

QUESTION: Well, then he surrendered it, didn't he?

MR. PICKETT: If you want to use "surrender", yes. But --

QUESTION: Well, what word do you like? I'll use whatever word you want.

MR. PICKETT: All right. He was in a classification at that particular point where he was going to be subjected to the provisions of the collective bargaining agreement. And I am saying that the collective bargaining agreement does not have to even enter into the duty of the employer. And the facts of this case, the employer could have accommodated, and the court so found -- meaning the Court of Appeals --

QUESTION: He could have ignored the agreement?

MR. PICKETT: By all means, Your Honor, Mr. Justice Marshall.

QUESTION: The employer could have ignored the agreement?

MR. PICKETT: And still met the burden imposed on it by the statute, yes. And I will --

QUESTION: And what would the union be doing?

MR. PICKETT: The union was agreeable to four days

[sic] off, for Mr. Hardison.

QUESTION: Was the union agreeable to waive the -- would the union -- listen to me --

MR. PICKETT: I am, Your Honor.

QUESTION: The union agreed that TWA could ignore its bargaining agreement? Now, you know, that doesn't happen.

MR. PICKETT: No, never did they say that.

QUESTION: I don't think so.

MR. PICKETT: They had no objection to Mr. Hardison working four days, however. TWA did have the objection. It was an economic objection. They took no efforts whatsoever. The statute says the employer must make a reasonable accommodation. Mr. Kussman told the union steward to try and find some swaps.

Addressing myself -- if I have answered your question, Mr. Justice Marshall --

QUESTION: I heard what you said.

MR. PICKETT: Mr. Justice Stevens asked in his question -- the union relief committee was available in this instance. At the same day that this case was tried, there was a Mr. Libby, whose wife was off because she was ill, he was accommodated under the union relief committee. Yes, there was something that the TWA and the union could do. There is an agreement that must be reached between the two.

QUESTION: Well, did he ask the union relief

committee to do anything?

MR. PICKETT: He didn't even know of the union relief committee, the record reflects, Your Honor.

QUESTION: Well, it's one thing to give a person relief for an emergency on one or two occasions, it's another thing to try to adjust a plant operation to no work on Saturday at any time, is it not?

MR. PICKETT: Yes,but that was -- that is not the facts in this case. Reasonable accommodation --

QUESTION: It is a fact that they made a number of adjustments for him, did they not?

MR. PICKETT: No, absolutely not, Mr. Chief Justice.

QUESTION: Well, then I read a different record from the one that you're talking about.

MR. PICKETT: All right. What did TWA do? They simply, after they received a letter from Mr. Hardison, called him in and said, "All right, we will let you have your holidays off, including Good Friday and Christmas, two Christian holidays, if we can work it out -- we'll let you have your holidays if you promise to cover those particular holidays covered by the bargaining agreement."

That never came into play. There never was a conflict as to whether or not they would or would not keep their word, let's say. So, therefore, that is not an accommodation as to his Sabbath in this case.

What else did they do? They simply said, "We can't do anything because the union will not let us." They could have said -- the collective bargaining agreement is not sacrosanct, federal law in fact supersedes it -- "File your grievance, and it will be taken care of under the collective bargaining machinery." That's what they could have done.

They did not do anything to accommodate his Sabbath observance. They talked with the union about doing something, but --

QUESTION: Did they ask to use the grievance procedure?

MR. PICKETT: He did not file a grievance. After the discharge hearing, in which the union told him "All we can do is plead for leniency", Mr. Chief Justice; he did not file a grievance, no.

What else could --

QUESTION: Would you suggest that if all an employer could do to make an accommodation would be to breach the collective bargaining contract, would you think the statute would require that and take precedence over the contract?

MR. PICKETT: Although we don't have to reach it in this case, yes, I would. Yes, I would. Franks echoes that also with the footnote, which I --

QUESTION: And if the union -- if the employer goes to the union to work out an accommodation, the union says,

"No, the collective bargaining contract requires something else", you would say the employer must nevertheless make the accommodation?

MR. PICKETT: I am saying yes, they must, because the law directs that the employer must make a reasonable accommodation.

QUESTION: And you don't think that was the case here?

MR. PICKETT: Absolutely not.

QUESTION: Do you think the union's position is that it is the case here?

MR. PICKETT: No. It is not. Because they did not disagree with TWA -- with Mr. Hardison, saying he will work four days off. They said that will not violate the collective bargaining agreement.

This case could have been worked out under the provisions of the collective bargaining agreement. If, in fact, it couldn't, then the collective bargaining agreement's provision should have given way.

TWA did not even try that. TWA did nothing. They threw up their hands and said "your, Mr. Hardison, suggestion" -- he said, "I'll work anything, I'll do anything, but I can't work my Sabbath", and in fact they said, well, "your suggestion, that's agreeable with you, and it will not violate the collective bargaining agreement, might cost us

money, and we also have a problem with a hypothetical futuristic deluge of grievances, and therefore we are not going to do it."

Now, what is reasonable? That is the real question. The particular statute is one which does not give a preference to anyone, it in fact applies a neutral type of application. In Griggs, this Court said that artificial barriers to those provisions, including religion, is what Title VII of the Civil Rights Act of 1964 is about.

The artificial barrier in this case is the collective bargaining agreement.

QUESTION: Mr. Pickett, let me just ask --

MR. PICKETT: Yes, Mr. Justice Stevens.

QUESTION: -- one more question. Is it your view that the company or the union, or both, could have accommodated your client without imposing any additional cost on the company and without violating the collective bargaining agreement? Or is one of those two things essential?

MR. PICKETT: That's two questions. They could have accommodated my client with a miniscule amount of cost to TWA, by way --

QUESTION: What do you mean? Do you mean overtime and --

MR. PICKETT: Supervisor covering, having somebody

stay afterwards.

QUESTION: All right. But is it essential that there be costs assumed, such as overtime, supervisor covering, or one day the job not manned, or something like that?

MR. PICKETT: I cannot say for sure that would --

QUESTION: I think in principle it's quite a different case, if you assume that than if you assume a cost figure.

MR. PICKETT: I could not say that might not occur, because in your hypothetical situation earlier in your questions to Mr. Feldmiller, if in fact they would have posted the job, then nobody might have bid on it, and, in fact, he could have been able to work within the collective bargaining agreement and there would have been no cost to anyone.

QUESTION: But their answer to that, as I understand it, is he didn't request that.

MR. PICKETT: That is correct. Because it was not open, I also remember his responding to you in that regard.

QUESTION: Well, then, on the basis of what he did, is it correct that there was no way to oblige him without either the company assuming some abnormal costs or violating the agreement, one of those two?

MR. PICKETT: That is correct, if abnormal costs include supervisor --

QUESTION: Right.

MR. PICKETT: -- employee keeping overtime.

QUESTION: Something else, yes.

MR. PICKETT: Then we have the emergency clause here on this collective bargaining agreement. What is more of an emergency than -- of course the problem, the first time they ever had it -- than an employee who is going to get fired and it's his Sabbath observance? They have two provisions --

QUESTION: That's not what it says. The Sabbath comes up every weekend, and an emergency doesn't.

MR. PICKETT: It was an emergency --

QUESTION: Isn't that the difference?

MR. PICKETT: Yes. It was an emergency for my client, Mr. Justice Marshall, by all means. Four weeks was all --

QUESTION: It wasn't his first Sabbath.

MR. PICKETT: Pardon?

QUESTION: It wasn't his first Sabbath, either. He had had Sabbaths before.

MR. PICKETT: He had never been compelled to work.

QUESTION: He had had Sabbaths before, though.

MR. PICKETT: Yes, he had, Mr. Justice Marshall.

QUESTION: So it wasn't an emergency. He knew it was coming.

MR. PICKETT: No, that he -- well, he knew --

QUESTION: He didn't know the Sabbath was coming?

MR. PICKETT: He knew the Sabbath was coming, yes. But he did not know that he was going to be compelled, by way of the collective bargaining agreement provision -- you see, he worked for TWA since 1967. He embraced -- studied the faith in April of '68, embraced it in September of 1968, and in fact TWA said, "We really think you've done a great job, Mr. Hardison, for assisting us in attempting to comply" at that time; of course, they had not even been called upon to comply with anything. Mr. Hardison had done it all by exercising his seniority within the particular collective bargaining agreement unit he was in.

From October '68 until 12/2/68 he had no problem, he was working on the graveyard shift, he in fact had opted to do that to make sure he would not cause his employer a problem.

He then -- he was married, his wife wanted him home. He did, for a secular reason he did in fact transfer to the day shift. He had no problem then. He was working Monday through Friday, got off before sundown; no problem there.

Until the vacation situation did, when Bill Wyatt went on vacation, thrust him into a position that he was compelled to.

QUESTION: Could he have challenged these -- raised these problems in the grievance procedure under the collective bargaining contract?

MR. PICKETT: I would imagine he most certainly could. He didn't know too much and he followed the union's lead as to what they suggested regarding leniency. He didn't even say anything at that particular -- nor was there any discussion on the part of the employer or the union of the application of Title VII. Although I believe it was in the contract.

The switch of shifts, the swapping, the going back in the building, he was precluded in every way: six months you had to be in Building 1 before you could go back.

He said, "I'll go back." "No, you can't do that, it takes six months." He couldn't swap because of the collective bargaining procedure.

But, again, what's important in this case as to the facts, and each fact situation of course is what dictates, each case is separate. In Rule 52 it was stipulated, everything was stipulated in a very laborious stipulation, as to what the facts are in this case. The judge had the written correspondence, the facts are clear. It was sincere, it was the first time in TWA's history and, in fact, what did the employer have to do?

QUESTION: Well, he did have some oral -- he heard seven witnesses orally.

MR. PICKETT: That is correct. That is correct. Absolutely. So he had the benefit of not only the written

record but likewise the credibility.

Now, the Court states -- the Court of Appeals -- that they did rely heavily on Judge Oliver's findings of fact. They had a different conclusion of law. He was clearly erroneous in construing that the employer did discharge his duty of reasonable accommodation when, in fact, the record reflects they did nothing. TWA did nothing affirmatively, as to the claim on the part of the union and in the brief of TWA --

QUESTION: You did say TWA did nothing. Who was the man that wrote the letter and said, "You come in and let's talk this over"?

MR. PICKETT: Mr. Kussman.

QUESTION: And he worked for whom?

MR. PICKETT: TWA.

QUESTION: Thank you.

MR. PICKETT: That was not an affirmative enough statement, writing a letter, in my judgment, to -- and Judge Webster so found.

QUESTION: Wouldn't it be more accurate to say TWA didn't do enough, than to say that TWA did nothing? That's all I'm saying.

MR. PICKETT: I understand.

Of any substance, they did nothing.

As to the constitutional argument, or tack-on

provision, the three-pronged test of Nyquist as to whether or not it was a clearly legislative purpose, job security, that it's clear in my judgment that that was the reason, and in fact in Griggs, it was so held that this was a constitutional statute. I don't think there is any major question as to whether or not it does in fact put forth a sectarian purpose.

Secondly, as to whether or not it had a primary effect to inhibit or in fact advance religion, the individual here was the recipient of any incidental type of arrangements that in fact had to be work out, not his religion. That particular provision in the statute, and of course the regulation was what applied at the time of the incident in this case, '67, about reasonable accommodation, that is what is important. It applies to all religions, it doesn't apply just to Sabbatarians, it applies to all aspects of practice, and this is a practice case.

He did in fact practice his religion and lost his job for it. The statute does not give the primary effect to religion in any fashion.

As to fostering an excessive entanglement of governmental aspects in the enforcement of it, we simply have the duty on the employee to initiate the government action. There is no auditing or any type of reports on the part of the recipient of anything here. It is simply if in fact the employee feels he is discharged, he has the procedural

requirement of filing a charge with EEOC and in perfecting his remedies, which, in this case, Mr. Hardison did so.

Therefore, there is no excessive governmental entanglement involved in the situation.

We simply have a reasonable accommodation as long as it does not cause undue hardship to the employer's business.

Now, are we to say that that is such a heavy burden? I suggest it is less a burden than the duty imposed by Griggs, to show that something is job-related and, to justify it, you must show business necessity.

TWA did not have to do very much, and they did very little. They did write a letter, and that's about where it ended.

QUESTION: If a supermarket chain had a fixed policy of not hiring any Sabbatarians in a supermarket, would they be violating some federal statute?

MR. PICKETT: Yes, they would, they would be violating -- if you're referring to Saturday Sabbath observers,-- the statute in question. As long as, again, the test has to be looked at, the facts of each case. If, in fact, the Saturday man was the only clerk, and it was a one-clerk store, as in some of the cases like Johnson vs. U. S. Postal Service, then in fact it would be an undue hardship on the --

QUESTION: Well, one more step, then: suppose a

large grocery chain says they will not employ, in a particular area, such as the Washington Metropolitan Area, more than 10 percent of persons who have their Sabbath on Saturdays; would they be violating some federal law?

MR. PICKETT: Here in Washington, and it would be a private employer with a requisite number of employees, they would be violating now Section 703(j), I believe, the reasonable accommodation provisions.

QUESTION: So that if they tried to have some adjustment from their own point of view to the necessities of running a supermarket store on Saturday and Sunday, which they all do now, I understand, they all operate on Saturday and Sunday, the two busiest days of the week, would they be in violation if they either refused to hire Sabbatarians or put a quota limit on the number of them?

MR. PICKETT: It would have to determine upon the facts of each case. What's reasonable? Reasonable is so important in the particular application of this statute. What's a reasonable accommodation? How many employees they have, what are their hours --

QUESTION: Well, the purpose of the supermarket is perfectly obvious, that they want to have enough clerks on Saturday and Sunday to take care of the overwhelming number of shoppers that do their shopping on Saturday and Sunday. So that's their need.

MR. PICKETT: I think the federal law's congressional dictate supersedes their sole need, if that's it, because the second step, of course, that one -- the district court looks at, is whether or not there is an undue hardship. And one does not get to a hardship being undue, or less than that, until something besides a letter requesting a meeting is in fact participated in.

QUESTION: What's your answer to -- what is the employer supposed to say to the -- say ten people come in and say, "We don't want to work on Saturday, we want to go to the football game and watch our children play, but we'll work on Sunday; and you let these religious practitioners off on Saturday, now let us off". What is he supposed to say to them?

MR. PICKETT: Again, they are not covered by the statute. And secondly, --

QUESTION: I realize that, but --

MR. PICKETT: -- the sincerity of --

QUESTION: So you do say that the employer -- that Congress is perfectly justified in requiring the employer to give benefits to the religious practitioner that he will not give to others?

MR. PICKETT: I respectfully disagree that there is a benefit. They are --

QUESTION: You don't think it's a benefit if they

can get off on Saturday and see their children play?

MR. PICKETT: I thought you were referring to the religion person getting a benefit.

QUESTION: Well, why isn't it a benefit? They are getting off on Saturday to practice their religion.

MR. PICKETT: Because this is basically a society in which we observe the Sabbath on Sunday, and it is a neutral policy that Congress chose to in fact effect --

QUESTION: I know, but here is --

QUESTION: It's not neutral as between people who want to see their kids play football on Saturday, and people who want to observe the Sabbath on Saturday. It's not neutral in that respect, surely.

MR. PICKETT: I would concur with you, Mr. Justice Rehnquist.

QUESTION: Well, at least there are some people that the employer is required to let off on Saturday and other people that he is not required to let off on Saturday?

MR. PICKETT: For religious purposes, if in fact Congress dictates --

QUESTION: So the answer is yes?

MR. PICKETT: Yes.

QUESTION: He can say no to the people who want to go to the football game, but he must say yes to the people who want to go to church on Saturday?

MR. PICKETT: Depending on the circumstances --

QUESTION: Well, there isn't any circumstances as I understand your position, no circumstances at all. He must let the people off on Saturday.

MR. PICKETT: If TWA had only three people who in fact could have done this particular job, and in fact would have shown that it would hamper them tremendously in that particular aspect, I would say they would not have had to accommodate him, because it would have been an undue hardship and in fact they would not have violated the law.

QUESTION: So if it costs them a little bit, it's all right; but if it costs them a lot, it's not all right? So it's just a reasonableness thing.

MR. PICKETT: There is a reasonableness test, which one has to be determined by the district court, and I think Franks vs. Bowman echoes that.

QUESTION: Would you say that the district court review and EEOC review and Court of Appeals review and the review by this Court is government entanglement with religion, in the sense that it was used in Walz?

MR. PICKETT: No.

QUESTION: Mr. Pickett.

MR. PICKETT: Yes, Mr. Justice Powell.

QUESTION: May I put a hypothetical: let's assume that the Worldwide Church of God -- and this is a hypothetical

-- it does use the radio extensively, as I understand it; let's assume that in addition to its basically religious emphasis, that it sought to persuade people to become converts by emphasizing the advantage of not having to work on Saturday, and the protection afforded by Title VII in that respect.

If you had a case with extensive emphasis on that advantage, would you view it differently from the way you view your case here today?

MR. PICKETT: Taking your hypothetical and not the facts of this case, no, I would not, because the law addresses itself to the purpose of employment security, purging interstate commerce with those things that are impermissible in in fact protecting employment security.

And the benefit, if any, which is incidental to the person, is to the person, not to any religious groups, and he cannot be credited with what his church may or may not say over the radio.

QUESTION: But if the church membership were very substantially augmented by the popular appeal that its members would not have to work on Saturday, do you think there would be any advancing of religion in those circumstances?

MR. PICKETT: No, I do not. And we're --

QUESTION: You do not?

MR. PICKETT: Pardon, I said I do not.

QUESTION: You do not. Even if memberships, say, were increased by significant numbers, a million people responded to an intensive radio campaign, "Join our church, you won't have to work on Saturday"?

MR. PICKETT: I, at that point, would say the district court, under Rule 52, in determining the credibility and the sincerity of the individual, would be able to determine that factor which would, of course, kick off any reasonable accommodation, if a person just joined for six months.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Pickett.

MR. PICKETT: I appreciate the Court's time.

MR. CHIEF JUSTICE BURGER: Mr. Lewin, we will restore two minutes of the time to your presentation.

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE NATIONAL JEWISH COMMISSION

ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

MR. LEWIN: Thank you very much.

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

As amicus in this case, we have filed an extensive brief responding, I think, to many of the questions that were propounded during Cummins and Parker Seal, as reflected in the transcript of that argument. And in the limited time available to me this afternoon, I would really just like to focus, I think, on two questions that have come up in the course of the oral argument today.

That is, the matter, one, of preference; and, two, the effect of the collective bargaining agreement.

With respect to the question of preference, we submit that there are really three answers to the argument that this is a preference:

One, that is no more of a preference than the basic prohibition in the statute that says that employees may not be discriminated against because of their religion. Now, no one challenges, and I think no party in either of these two cases has challenged that belief to the extent that the word "religion" covers belief, would be covered by that. No employee may be fired because he believes in Allah or because he believes in papal infallibility.

But there's nothing in the statute that says that an employee may not be fired because he believes in the Democratic Party, or because he believes in socialized medicine, or because he believes in the Communist Party. In other words, Congress says this form of belief, and maybe actions related to it, are entitled to protection.

So that, to the extent that an employee may say, "I have a purely secular or philosophical belief," he is not protected by the federal statute. And yet a religious belief entitles him to protection.

And we think that that, to the extent, then, that it applies to any practice which, under the standard in this

statute, a practice that does not substantially affect an employer's ongoing business -- and that's really what the statute says. If a practice that grows out of that belief should not or does not substantially affect your business, you're really discriminating against somebody on account of his belief.

Now, the question -- if I might just simply then turn to a second reason why we think this is not a preference, and that is: that it is simply, even to the extent that it provides some form of protection for a practice -- and this Court's cases in Cantwell, in Sherbert, and others, have recognized that practices protected under the free exercise clause, to the extent it covers practice is not a preference, it's simply an equalizer provision. Because, particular with respect to the question that comes up in this case, such as Sabbath observance, our society is permeated with majoritarian religious customs that make life comfortable, easier for those who adhere to the majoritarian faith.

Sunday laws, which this Court recognized in McGowan vs. Maryland, are the most obvious illustration of that. But one need not go to general Sunday laws, one can look to the very provisions of the collective bargaining agreement in this record, which recognized Christmas and Good Friday as holidays under the collective bargaining agreement.

And there was testimony, in addition, that over

weekends, and apparently on Sundays, -- in responding to Mr. Justice Stewart's question about what did this company do with regard to Sundays -- I think, notwithstanding the fact that they are a seven-day-a-week operation, 24 hours a day, there was testimony that there were only skeleton staffs over the weekend.

So it's very likely, both in view of that and in view of the fact, even, that Missouri had a statute, not quite as extensive as the absolute protection for Sunday observers that appears in Sherbert v. Verner, that Mr. Justice Brennan cited in the Court's majority opinion in Sherbert v. Verner, that says that no Sunday observer may be forced to work against his religious conviction, but Missouri also had a statute, effective until 1963, which prohibited every person from compelling or permitting his apprentice or servant or any other person under his charge or control to labor or perform work on Sunday.

Now, that was substituted for later on by a more customary form of Sunday law; but, nonetheless, there has been a general practice in Missouri and elsewhere to recognize that Sunday is the kind of day which, because it has its basis originally in religion, people should be entitled to be off.

Now, what this statute does is it accommodates minority faiths who don't have the advantage or convenience of

having Sunday, and it accommodates particularly those who have very firm and strong conscientious convictions in this regard. This is not simply -- Congress, I think, has recognized that this is not simply a matter of preference or some greater desire, possibly like watching a football game, to the community that I represent, that we as amicus represent here today, the Orthodox Jewish Community, for example, the Worldwide Church of God Community, the Seventh Day Adventist Community, this is an absolute inescapable, unconditional block. There is no way that an Orthodox Jew will accept employment which requires him to work on Saturday.

And Congress, I think, recognized that, and we have recognized that in the actions that we have taken, our organization has taken -- the various results of that appear in the appendix to our brief. I think the Chief Justice asked about supermarkets, for example. We've negotiated a substantial number of situations as a result of the enactment precisely of this kind of a statute, under which Orthodox Jews have been employed in supermarkets and have worked on Sundays or on other holidays in place of working on the Sabbath, when they could not be employed.

So this has been an absolute roadblock. The real fact is that employers cite hardship, cite neutral rules as an original objection; but, in the actual implementation of this kind of a statute, in the actual negotiation, we have

discovered that the problems disappear.

This Court has heard this morning about the problems of the collective bargaining agreement. The TWA counsel could not provide an answer to Mr. Justice Stevens' question, he simply said it was the collective bargaining agreement with all its very rigid provisions.

And counsel for the union simply said: Well, we don't allow variations from that collective bargaining agreement.

In fact, if TWA, a massive employer with 200 people on the site, could not accommodate by allowing this individual to work on Sunday, which is a less desirable day to work, and when they need employees, rather than working on Saturday, it's hard to see who could accommodate.

Certainly the statute, to the extent that it provides for undue hardship, is speaking about small employers such as the ones in Johnson v. Postal Service or other cases, or, to take the Chief Justice's illustration, where there is a large number, if in fact that is a large number of Sabbatarians, and an employer can show, "We can't hire more than ten percent, because we need 90 percent of our work force on Saturday", we would recognize that that satisfies the statute.

QUESTION: But your colleague said that that would violate federal law.

MR. LEWIN: I think the courts would recognize that, Your Honor, that that is precisely what the undue hardship provision provides.

Let me turn briefly, just in the minute or two I have remaining, to the collective bargaining agreement.

We think that the collective bargaining agreement provides absolutely no right whatever in the face of the statute. A collective bargaining agreement is an agreement between an employer and a group of his employees in which the employer signs over rights that he has, in the absence of the agreement, to the organization representing his employees.

He can't sign -- I'm sorry.

QUESTION: Mr. Lewin, you do recognize that with a bargaining agreement, the employer is not free to follow the law and ignore the agreement, is he?

MR. LEWIN: Oh, we --

QUESTION: He's going to have trouble, isn't he?

MR. LEWIN: With all respect, --

QUESTION: Isn't he going to have trouble?

MR. LEWIN: He may have trouble, but if that union gives him trouble, he can take them to court. Because we think they cannot prevent him from following the law. We think that all that the agreement entitles the employer to do is to assign to the union rights that he has --

QUESTION: I think that what the law says, that

whatever you can do without interfering with agreements and other things, you must do. The others have to be reasonable, or not. And I think the whole thing goes into reasonable crucible.

MR. LEWIN: Well, but, Mr. Justice Marshall, --

QUESTION: Don't you think that the agreement is a part of the reasonable?

MR. LEWIN: An agreement is part of the reasonableness rule, yes.

QUESTION: That's all I want.

MR. LEWIN: We agree with that. But we think an -- the union speaks here of rights, as if the rights grow out to the union and the employees against the whole world. An employer couldn't sell the Brooklyn Bridge in his collective bargaining agreement and then have his employees or his union say, "We have rights to the Brooklyn Bridge, because you put it into the agreement."

QUESTION: Well, TWA doesn't own it.

MR. LEWIN: Pardon?

QUESTION: TWA doesn't own the Brooklyn Bridge.

MR. LEWIN: Well, that's exactly it. And they don't own Hardison's right to an accommodation under the federal statute. That's precisely the analogy, Mr. Justice Marshall.

QUESTION: But they also have an agreement with the union.

MR. LEWIN: In which --

QUESTION: And they cannot ignore it.

MR. LEWIN: We're not suggesting they ignore it, but the agreement with the union --

QUESTION: That's what I thought you were saying, that the union agreement had nothing to do with it.

MR. LEWIN: Well, we say the union agreement cannot override the statute, because whatever the employer can assign away -- and that's all that the union agreement is, we think that the cases demonstrate that a union agreement is a contract between an employer and his employees. And it says, from an employer, "I give over to you the right to assign employees, to transfer them, to use seniority provisions", but he can't assign over something that he doesn't own. He can't assign the Brooklyn Bridge and he can't assign the rights of Mr. Hardison.

QUESTION: I suppose a closed shop agreement would be no defense in a right-to-work State, on a claim by someone who refused to join a union, even though the closed shop agreement had been signed by both the union and the employer.

MR. LEWIN: Absolutely. And we submit that a union collective bargaining agreement that said the employer may not hire female employees would not be a defense, even if the employer would say, "Well, as soon as I hire a female employee, the union is going to get after me." But that's a

violation of the law. You can't contract away a right that the statute gives to third parties. And that's what the TWA has tried to claim here.

They've tried to claim that their hands have been tied because they have contracted away Mr. Hardison's rights. They have no right to contract away Mr. Hardison's rights, no more than they have a right to sell the Brooklyn Bridge.

Thank you.

QUESTION: But you agree they are contracted away by the very clause in the statute relating to business necessity and reasonableness, are they not?

MR. LEWIN: To that extent, Mr. Hardison's right is limited, yes.

QUESTION: Yes.

MR. LEWIN: In other words, the employer may say, "I can contract away to the union Hardison's right to only require a reasonable accommodation of me."

QUESTION: Therefore, it follows that the free exercise clause, in your position, is not an absolute guarantee, it's a conditional guarantee.

MR. LEWIN: It's conditional, and it depends on an evaluation of various circumstances. And we argue in our brief, I think extensively, and we submit on that brief, that it is proper for Congress, in order to implement the free exercise clause against private parties, to enact a statute

such as this, to protect religion.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have some rebuttal?

You have five minutes, Mr. Ratner.

REBUTTAL ARGUMENT OF MOZART G. RATNER, ESQ.,

ON BEHALF OF PETITIONERS IAM&AW

MR. RATNER: In view of the shortness of time remaining, I am going to have to rely principally on my reply brief, which does dispose, I think, of most of the contentions Your Honors have heard, but I want to make several points.

One, I think it's established from the argument already that despite Mr. Lewin's peculiar use of the term "discrimination" and "preference", we do have here a statute which affords a discriminatory preference to religious adherence as distinguished from people who want to violate or not to comply with uniform rules requiring attendance at work, who want to do so for valid secular reasons.

Now, with respect to that discrimination and the preference accorded religious adherents because of that, we think the Chief Justice's comment in his dissenting opinion in Nyquist is controlling.

The discriminatory enactment favoring religious over nonreligious activities would plainly be governmental

sponsorship of religious activities.

And the reason that is so is because discrimination is partiality, and partiality is the antithesis of neutrality. And contrary to the observations that were made by opposing counsel, the assumptions that they have made, in our submission the religious activities that may not be promoted by such discriminatory enactment are not activities merely of religious institutions, but cover those of religious adherents as well, including the observation of the Sabbath.

As far as the constitutionality of this section 701 (j) resting on the same premise as the prohibition of discrimination against religious beliefs and observers, let me merely say that to safeguard religion and religious practices against discrimination is to betray and disclose benevolent neutrality in its true sense. But to afford them a discriminatory preference by expropriating rights and benefits of others and conferring them upon the religious observers, that is, to say the least, partiality, sponsorship, and that is what the establishment clause prohibits.

The essential theory of the opposition case is that this Court must balance undue hardship against the need of the religious observer.

The other part of that balance is a determination of how important is the particular practice in the matrix of that particular religion, and how vital is that particular practice

which the observer seeks to accommodate to his own religious beliefs, how important is it to him?

It is that kind of question which employers and unions, OEO's and district courts and Courtsof Appeals and this Court will be plunged into if this statute is given the construction which our opponents contend; and that's entanglement with religion on a completely different level than anybody has seen it in any statute that's heretofore reached this Court.

Finally, I want to say that the assumption on which the theory here rests, that Congress can somehow demand that employers and unions reasonably accommodate the religious practices of employees, is predicated on analogies, the cases like Sherbert vs. Verner and a line of argument which this Court examined in full and rejected in the Nyquist case.

QUESTION: Excuse me, Mr. Ratner, before you sit down. I assume TWA has got a computer.

MR. RATNER: Yes, sir.

QUESTION: I'm assuming they do.

MR. RATNER: I hope so. I mean, I don't know.

QUESTION: And they have it in the employment office.

MR. RATNER: That I'm sure they have.

QUESTION: Couldn't they have in the computer the number of men who would prefer to work on Sundays rather than

Saturdays, the number who would prefer to work on Saturdays rather than Sundays, so that all you would have to do would be to push a button and you'd find that number.

MR. RATNER: The answer to that is, Your Honor, I don't know. I have the vaguest notion of speculating about it. I am --

QUESTION: You don't know anything about computers?

MR. RATNER: I don't know anything about whether they could do that. I do know that they probably haven't asked anybody about what their preferences are.

QUESTION: Well, assuming that a computer could do that, --

MR. RATNER: A computer could do it, presumably.

QUESTION: -- then when they make up their job schedules, wouldn't it be rather easy?

MR. RATNER: It would be impossible without violating seniority. I mean, they --

QUESTION: Well, couldn't the computer have the seniority in there? They have everything else in there.

MR. RATNER: Well, if they ran the posting system, the job bidding system by computer, they would run it by computer. It might be another way at it.

QUESTION: Yes.

MR. RATNER: But it doesn't change the legal problem, I think it changes the practical problem.

QUESTION: Mr. Ratner, I asked your colleague on the other side whether the collective bargaining contract was implicated here at all. Is it your suggestion that the collective bargaining contract stood in the way of the kind of reasonable accommodation that your opposition indicates should have occurred here?

MR. RATNER: With two exceptions. The company could have held employees overtime and they paid them overtime, and that wouldn't have bothered us. They could have allowed him to work a four-day week, as I understand it; that wouldn't have violated the collective bargaining agreement. All that --

QUESTION: What would it have done to the company, for them to --

MR. RATNER: Well, it would have destroyed the company, it would have been a substantial burden on them.

QUESTION: What, the four-day week thing?

MR. RATNER: Sure.

QUESTION: Why?

MR. RATNER: Well, it would have required them to make some kind of arrangement about paying somebody else to cover for them, possibly. I don't know.

QUESTION: Double time? Time and a half?

MR. RATNER: Time and a half, yes.

QUESTION: Well, all right. But, otherwise, except

for those two things, you say the --

MR. RATNER: Well, I'm saying those are two, what are called, accommodations.

QUESTION: Yes.

MR. RATNER: That, as far as I know, could have been made without violating the collective bargaining agreement. Those involve a tax on the company. And it's my submission that that's just --

QUESTION: Well, it seems to me -- the position on the other side must worry you sufficiently, that here you are. I mean, is their position broader than that? I guess their position is that even if it did trample on the collective bargaining contract, that's irrelevant.

MR. RATNER: Yes, that's right. And that's what worries me.

QUESTION: That's why you are here.

MR. RATNER: That's why I am here.

QUESTION: Yes.

MR. RATNER: Of course. That's why I'm here.

QUESTION: Mr. Ratner, I ask this only because of something in your brief.

MR. RATNER: Yes, sir.

QUESTION: Do you think that this Court in General Electric v. Gilbert cut back a bit on Duke Power v. Griggs?

MR. RATNER: Must I?

QUESTION: Page 17.

MR. RATNER: I'd prefer not to answer that question.

[Laughter.]

QUESTION: All right.

QUESTION: Mr. Ratner, let me ask you one question, if I may. Do you understand the statute to provide that in order to be triggered, the employee must say, "I simply will not work on the Sabbath, and even if it turns out that no reasonable adjustment can be made and I lose my job as a result, that's the way it is", or that he can come in and simply say "I prefer not to work on the Sabbath"?

MR. RATNER: Well, I think that any indication that he'd like to be accommodated, that he'd like to have something done so that he wouldn't have to work on the Sabbath, is enough to trigger a constitutionally construed obligation under this statute, for a company to see if something can be done reasonably to accommodate him. We said that in our brief.

QUESTION: Well, would the reasonableness of the company's reaction depend, in part, on the intensity of the belief?

MR. RATNER: That's my -- the last point I made was that it would depend in part on the intensity of the belief and the nature of the practice and how important it is in the hierarchy of that religion and how important in the hierarchy of that individual's observance of it.

And I suggest to Your Honors that that's the very reason why this statute cannot conceivably stand. Because that's the worst entanglement that ever was with religion.

QUESTION: Mr. Ratner, there was a really simple answer to Justice Blackmun's question, that I wrote, the Chief Justice wrote the Griggs v. Duke Power, and he joined without reservation in the General Electric case.

You don't have to adopt that answer.

[Laughter.]

MR. RATNER: Thank you, Mr. Chief Justice. I appreciate your getting me off the spot.

QUESTION: It happened because he agreed with the cutting back.

[Laughter.]

MR. RATNER: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:02 o'clock, p.m., the case in the above-entitled matters was submitted.]

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