ORIGINAL

In the

Supreme Court of the United States

Parker Seal Company,

Petitioner

v.

Paul Cummins,

Respondent

No. 75-478

Washington, D. C.
October 12, 1976

Pages 1 thru 50

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PARKER SEAL COMPANY, Petitioner	:	
v.	:	No. 75-478
PAUL CUMMINS, Respondent	:	

Washington, D. C.

Tuesday, October 12, 1976

The above-entitled matter came on for argument at 1:54 o'clock, p.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

APPEARANCES:

LEONARD H. BECKER, ESQ., Porter, Macrory, Becker & Ryerson, 1229 Nineteenth Street, N. W., Washington, D. C. 20036, For the Petitioner.

THOMAS L. HOGAN, ESQ., 1288 Cherokee Road, Louisville, Kentucky, 40204, For the Respondent.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C., 20530, For the Respondent as amicus curiae.

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 75-478, Parker Seal Company against Paul Cummins.

Mr. Becker, you may proceed when you are ready.

ORAL ARGUMENT OF LEONARD H. BECKER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case arises on a writ of certiorari to the Court of Appeals of the Sixth Circuit. At issue are the interpretation and validity of two parallel provisions of Federal law.

The first is a guideline of the Equal Employment Opportunities Commission which was promulgated in 1967. Second, is a 1972 amendment to Title VII of the Civil Rights Act of 1964 which adds to that statute a definition of the term "religion."

These provisions require the employer to accommodate all aspects of the religious observance and practice of his employees, unless the employer can demonstrate that to do so would work an undue hardship to the conduct of his business.

The facts of the case may be briefly summarized. The Respondent, Paul Cummins, worked for a period of approximately 12 years at the Berea, Kentucky, plant of the Petitioner, Parker Seal Company, and rose to the level of departmental supervisor.

In 1970, he joined the World Wide Church of God which

observes its Sabbath from Friday at sundown to Saturday at sundown. He, thereupon, advised his immediate superior that he would no longer be available for work on Saturdays. He was not discharged. To the contrary, he was granted Saturdays off for over a year. During that period of time, management directed fellow supervisors to substitute on Cummins' behalf on each and every Saturday that his department was scheduled to operate.

In or about August of 1971, when an increasing workload at the plant had given rise to difficulties with this arrangement, Cummins was requested by his superior to undertake, voluntarily, to approach his fellow supervisors and, on his own initiative, to offer to relieve them during their respective overtime shifts during the middle of the week.

Cummins did not do this. He was then requested to reconsider his position with respect to Saturday work. He declined to do so and he was discharged.

Cummins instituted two proceedings. First, under Kentucky law, before the Commission on Human Rights, that Commission applied a State civil rights statute which followed the Federal law in all pertinent respects, including the accommodation provision which is at issue here.

After a full-dress evidentiary hearing, the State Commission determined that the employer, Parker Seal, had made a reasonable attempt to accommodate Cummins and dismissed

Cummins' complaint.

Cummins also instituted a Federal proceeding. First, by filing a complaint with the EEOC and then, upon receipt of his statutory right to sue letter, a Federal complaint was filed in District Court of the Eastern District of Kentucky.

Cummins agreed that that Court could decide his claim on the basis of the evidentiary record that had been compiled before the State Commission. On that basis, the District Court, again, held in favor of Parker Seal.

The Court of Appeals of the Sixth Circuit reversed that judgment. It did so largely on the basis of its conclusion that Parker Seal had failed to demonstrate why the accommodation which was supposedly reasonable for over a year had suddenly become unreasonable.

We submit that this judgment was erroneous for three reasons. The first reason is that the decision of the Court below, in effect, penalizes the company for having attempted for over a year to work out an accommodation of Cummins. Indeed, the court below has flung that effort at accommodation in the face of the company as an admission against the company's interest.

QUESTION: Mr. Becker, I take it there is no question as to the employee's sincerity of his belief. You are not questioning this in any way?

MR. BECKER: That's correct, Mr. Justice Blackmun.

No issue, as such, is presented on this record.

A second reason that the judgment below was erroneous, we submit, is that it is flatly inconsistent with other decisions, both of the Sixth Circuit and of other courts of appeals which indicate that the employer stands on firmer ground when he shows he has made some attempt at accommodation, and then can point to that effort in support of his position that the effort is unsuccessful.

We believe that that line of decisions better comports with the statutory objective here which must be one of voluntarism of efforts on the part of both employer and employee to arrive at some mutually acceptable arrangement, given the employee's views.

QUESTION: When you say voluntarism, Mr. Becker, there is really nothing voluntary about what the employer is doing. He is being required to do it by an act of Congress.

MR. BECKER: I quite agree. And I would say, Mr. Justice Rehnquist, that that is a point of great force for us on both the statutory and constitutional planes in this case.

Recognizing that, though, in addressing myself at this juncture exclusively to the statutory argument, I would say that if the thrust of Congress is to achieve an accommodation by the employer of the employee's religious needs, then that overall objective -- putting the establishment clause to

one side -- that overall objective is better satisfied if the employer can make an attempt at accommodation without subjecting himself to the risk of what happened in this case which was that that attempt was then used against him when he got to court.

QUESTION: In that connection, who has the burden of proof to come up with alternative solutions?

MR. BECKER: Under the regulation and under the statute, both, the courts have held that the burden rests with the employer to show the prima-facie issue of the reasonableness of the accommodation or the undueness of the hardship.

We think we met that burden here and we think we did so by demonstrating the unrealistic nature of the various alternatives which were proposed.

I might note, in passing, in response to your question, Mr. Justice Blackmun, that none of the alternatives proposed were advanced before the Kentucky Commission or, indeed, before the District Court. They seem to have arisen at the appellate level.

It is suggested, for instance, below, that an alternative arrangement might have been for Mr. Cummins to work on Sundays. We submit this was unrealistic. The plant rarely, if ever, operated on Sundays. There was no point, we submit, in having Mr. Cummins come in to supervise a department where his men were not working.

Another suggestion which was advanced by the Court of

Appeals and which, to our surprise, has been adopted by the United States as amicus, is that Cummins' pay might have been cut. Now, Commins was not an hourly employee. He was paid an annual salary. He was required to work whenever circumstances required. The plant operated on what was known as a five-plus day schedule, that is, it ran Mondays through Fridays on a regular basis and then worked over on Saturdays when the work-load required.

We fail to understand how cutting Mr. Cummins' pay in response to his request to be relieved on Saturdays would, on the Respondent's theory of this case, any more pass statutory muster than the discharge which actually resulted.

Now, the third point which I wish to make with respect to the judgment of the District Court and why we submit that that judgment was erroneous is this: We think that the overall approach of the Court of Appeals was erroneous. It assumed that the initial arrangement was satisfactory. On the record, that was not so.

It is clear that other supervisors were forced to work overtime on account of Cummins' religion. They received no extra compensation for their efforts. Moreover, to the extent that supervisory personnel were forced to split their time on Saturday mornings, as between the department from which Cummins was absent and the departments which his fellow supervisors were required to operate, there was a necessary doubling

up.

The plant manager testified at the hearing that that was absolutely not a satisfactory operating procedure.

QUESTION: Don't you think this Court would be apt to take the judgment of the Court of Appeals on a kind of a ad hoc factual basis in an individual case where the test is reasonably accommodate, rather than second-guess the Court of Appeals on the facts of the case?

MR. BECKER: Well, I would assume, Mr. Justice Rehnquist, that this Court would not wish to be put in the position of second-guessing facts.

The difficulty we have here is the Court of Appeals, itself, has put itself in the posture of second-guessing facts. And we have a question in the on-going administration of the Act as to the manner in which the Court of Appeals should subject to review the judgment of the District Court.

We agree that the test under the statute is one of reasonableness. In essence, the question is whether the employer has acted reasonably under all the circumstances. And, so far as the statute is concerned, putting aside the constitutional question, that is a factual issue which we agree must be decided on a case by case basis.

The problem here is twofold. First, the Court of Appeals has injected an undue improper consideration into the case. It has escalated one element of the case to a dispositive

level. And that element is the fact that this employer made an attempt to accommodate and decided after a year that it didn't work.

Now that, we think, presents a question of law which is appropriately submitted to this Court for its review.

The second problem we have with the manner in which the Court of Appeals disposed of this case is that the Court of Appeals itself put itself in the position of reviewing the record de novo.

Despite the protestations of the majority opinion, we submit that the court below essentially retried the case. And we think that is an improper way for Courts of Appeals to proceed in cases of this sort.

QUESTION: It was submitted on a written record, though, to the District Court, wasn't it?

MR. BECKER: That's correct. The District Court had before it the evidentiary record that was compiled before the Kentucky Commission. And the District Court also had before it Cummins' agreement that the case could be disposed of on that record.

QUESTION: But you don't have, in this case, then, any question of the Federal District Judge's evaluation of credibility of oral testimony.

MR. BECKER: I agree, Mr. Justice Rehnquist, the District Court did not have the demeanor of the witnesses before

it. It did have the record that was compiled before the Kentucky Commission which consisted of a panel of several members who did have the benefit of such demeanor and who did observe the witnesses as they appeared before that Commission.

Now, in explaining why we think the decision below is incorrect, I wish to revert one last time to the point that we think the Court of Appeals has improperly elevated one factor which is the effort of this employer to accommodate.

We think the Court of Appeals erroneously concluded that that effort at accommodation was reasonable at the outset. We think it was an extension of activity on the part of the employer that went far beyond a satisfactory arrangement, so far as that employer was concerned.

Moreover, we think the Court of Appeals erred when it concluded that Parker Seal failed to show why that arrangement suddenly became unreasonable. We think the reason it became unreasonable is perfectly clear on this record.

As I indicated, at the outset, the problem was that Cummins was failing on his own initiative to volunteer to assist his fellow supervisors. The fact is that at the outset of this arrangement in July of 1970 Cummins expressed great willingness to be cooperative and assist wherever assistance was asked for. But his attitude changed and by the time he was discharged it is clear from the testimony of his fellow supervisors and of his plant managers that he had not fulfilled his share of the

bargain.

We think it merits emphasis in this case that this is not a case of discrimination. Indeed, there was never any suggestion at any level of these proceedings that this company had intentionally discriminated against Cummins because of his religion.

The facts of the case belie any such suggestion. The accommodation which was extended Cummins for over a year shows that this company bent over backwards to avoid discriminating against him because of his religion.

The question here is very different. It is, on the statutory level, whether a company has satisfactorily performed a very different obligation which is to accommodate an employee on account of his religious needs.

Now, in underscoring the difference, I wish to point out that it is virtually conceded here by parties that if this case did arise under the basic anti-discrimination provision of Title VII, Parker Seal would be home free.

I think it is abundantly clear, for example, that this company complied with the requirements which were laid down in the Griggs decision. If I may quote for just a moment from that opinion, the court there said that "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Now, the impact of this particular statutory provision

is to require a preference which I submit worked a discriminatory effect, not against Cummins who benefited from the arrangement for over a year, but against the fellow supervisors who were required to come in and substitute for Cummins on each and every Saturday that his department was operating.

QUESTION: Is this a statutory argument you are making or a constitutional argument?

MR. BECKER: This is part of my statutory argument, Mr. Justice Rehnquist, and I am stressing the difference between the basic anti-discrimination provision of Title VII with which this Court has previously dealt, and the very different accommodation provision which the definitional section added in 1972 and the EEOC guideline required.

QUESTION: But just because they are different, doesn't that suggest that there is going to be an element of discrimination against the people who observe the Sabbath on Sunday, and that type of thing, people who practice the religion of the majority?

MR. BECKER: That's a point which I will address and develop on my constitutional argument. You are, of course, absolutely right, Mr. Justice Rehnquist.

QUESTION: Then, it doesn't seem to me it helps your statutory argument very much.

MR. BECKER: I am merely explaining -- all I intend to do by this argument, at this level, is to explain the

difference which we see between a discrimination case and a case arising under this statute. I am pointing to the fact that had this case arisen under the basic provision of Title VII, this employer would surely have been free of liability. And I am merely explaining the added burden which this statute imposes on the employer. A burden which, I hasten to add, I think we met. And we met it by relieving this fellow of his obligations for over a year.

Now, in that regard, we have developed in our main brief a list of the factors which we think will be pertinent on the statutory level in assessing the reasonableness of an employer's efforts to accommodate on a case by case basis.

We think this case is an appropriate vehicle for the Court to consider some of those factors and perhaps to advise the lower court, whose opinions are in some disarray, on this subject, what factors may and may not properly be considered.

One factor, as I previously indicated, which we think should not be accorded dispositive significance is the suggestion that because the employer has made an effort at accommodating the employee he is somehow subject to a heightened obligation to explain why the accommodation is no longer possible.

Let me turn now, if I may, to the constitutional side of our case.

In the event that the statutory question is resolved adversely to us, we challenge the Federal constitutionality of

both the guideline and the statutory amendment. We say that those provisions, in tandem, violate the Establishment Clause of the First Amendment.

Now, the Court is fully familiar with the three-part test or guideline which has developed in the context of the various school aid cases which have been before it over the years.

Those principles are discussed in full in our briefs and I shall not belabor them here.

I wish to make only the following few points:

First, this statute undoubtedly, indisputably aids religion. That is its whole point and purpose.

Senator Randolph said so when he introduced it on the floor of the Senate.

The language of the statute and the guideline, itself, make it clear that that is all the statue and guideline are concerned with.

QUESTION: Isn't 4(b) concerned with aiding the free exercise --

MR. BECKER: It is an attempt by Congress to force the employer to make accommodations or to permit the employee to engage in one kind of activity which is religious activity. I do not, in any sense, Mr. Chief Justice, denigrate the motives of Congress in passing this statute. It is clear that its instinct was highest purity. The objective was to assist in the

ability of certain employees to enjoy their religious activities.

Now, I note that immediately a question is presented under the Establishment Clause because of the narrow focus of this statute. It is devoted solely to the assistance of religionists. Moreover, we submit that the statute is devoted solely to the assistance of certain religionists, namely, those who wish to observe their Sabbath on a Saturday. That was the precise purpose for which Senator Randolph said he was introducing this legislation.

QUESTION: The statutory language is certainly broader than that, and supposing you get somebody who doesn't want to eat meat on Friday. He will have some sort of an argument that maybe fish ought to be served in the cafeteria on Friday, won't he?

MR. BECKER: That's correct, under the statute. That's quite right. The statute reaches all aspects of observance and practice of religion. But I note that the guideline, which antedated the statute, is called, "Observance of Sabbath and Other Religious Holidays."

The introductory section of that guideline says that several complaints filed with the Commission have raised the question concerning employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath.

The guideline was directed to the problem of the

Saturday observing religionist. And that means it was directed to one particular sub-group of religious practicioners.

We submit that that further points to the constitutional impropriety of this legislation.

I want to stress the difference between this case and the Sherbert v. Verner decision of this Court. That was the case in which the Court dealt with the Seventh Day Adventist who was apprised of Unemployment Compensation benefits under a South Carolina statutory scheme which denied benefits to those who are unavailable for work.

Now, the argument that has been developed on the other side in this case is that as part of a statutory scheme that deals with discrimination, Title VII, Congress could pick up the notion of discrimination that was developed in Sherbert and simply apply that passu to private people.

We think that argument is wrong.

The first point is that Sherbert was not a case of discrimination. The appellant in that case presented a claim of denial of equal protection which was not passed upon. What was presented there was the problem arising from the State's even-handed application of a facially neutral Unemployment Compensation scheme which resulted in Governmental pressure on the appellant because of her religion. And that introduced an improper infringement on her free exercise.

That, I submit, is very different itself from a

discrimination case.

Now, there is another point on which the Sherbert precedent is different. In that case, the Court noted that a separate State statute expressly saved out the Sunday worshiper. The State laws then laid together clearly separated the Saturday from the Sunday observing worshiper.

That is not true here. Parker Seal, on rare occasions, operated its plant on Sunday and one of the witnesses at the hearing, Webb, testified that as a supervisor he was, on occasion, required to come in on Sundays, even though to do so violated his religion.

It is clear, then, that this company did not discriminate between Saturday and Sundary observers as did the South Carolina statutory scheme considered as a whole in Sherbert.

Now, both the Sherbert precedent and the other precedents which were relied upon by the Respondent, go to the notion that where the Government infringes or is about to infringe on the free exercise rights of citizens, then relief may, and in some cases, must be in order, even though the result might abstractly be deemed to give rise to some establishment question.

To rephrase the proposition, an Establishment Clause objection will be overridden where, in order to satisfy it, the Government would be required to infringe upon the free

exercise rights of the affected persons.

This Court's decision in the Yoder case, the Amish school children case, is a conspicuous example of -- or a conspicuous illustration of that proposition.

This is not that case. This is a case in which the Government is saying to one private person, "You have got to change the way you do business," in order that another private person may enjoy his religious rights.

Now, once again, the purpose may be thoroughly understandable. But the problem is that it amounts to something which goes to the core on the Establishment Clause.

It is Governmental pressure, coercion, being leveled against one person on account of another person's religion.

QUESTION: What do you do with cases like McGowan v. Maryland -- uphold Sunday closing laws?

MR. BECKER: Well, those cases present their own difficulties. Candidly, I am not sure that they can be easily reconciled with the Yoder decision, but they certainly rested, themselves, on the proposition that an overriding non-sectarian, secular purpose had no debate at the State legislatures.

The interest in engendering a uniform day of rest -- and, the Court said, although those statutes may once have had their origins in religious notions those religious notions had eviscerated and there was now a secular purpose which overrode the objection of the Orthodox Jew who was forced to choose

between his religion and his livelihood.

That's not this case. There is no nonsectarian purpose to this statute. The statute, on its face, is directed to the protection and enhancement of certain religious groups.

And, indeed, the language of Senator Randolph makes it clear that he was sponsoring it because Saturday observing groups, of which he was a member, were having difficulty in keeping up their congregations because some of the members had to work on Saturdays.

QUESTION: But, Senator Randolph's comment, I don't think, can be attributed to all the other ninety-nine Senators and however many members of Congress it is who voted on the thing.

MR. BECKER: It certainly can't be imputed to them all, Mr. Justice Rehnquist. However, it makes up virtually all of the legislative history on this statute.

Now, the Court has indicated that one branch of the three-part test under the Establishment Clause will be to consider the purpose of the Legislature in enacting the challenged statute.

It seems to me that it is appropriate, assuming that the purpose branch is different from the primary effect branch, to look at what the Legislature said when it enacted the statute.

QUESTION: What the Legislature said is contained in

the law that it passed, sometimes in the Committee reports. It certainly isn't contained in the comments of one member of the Legislature.

MR. BECKER: I agree with that completely, of course. But if we look to the words of both the guideline and the statute, there, again, the problem is presented. The primary effect of this statutory scheme is to enhance religious activity. That is its whole point and purpose. And if we divine the purpose of the Legislature from the necessary effect of the statutory words, we reach the same result.

I reserve the balance.

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

Mr. Hogan.

ORAL ARGUMENT OF THOMAS L. HOGAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I'd like to begin by clarifying one factual error, I think, that has been made. And this is the question of whether or not the company did, in fact, accommodate Mr. Cummins for a year.

On page 173 of the record, when the question was directed to Mr. Haddock, who was the plant manager, and he was asked, "When did you become aware of Paul's religion?" And his answer was, "Not until the summer of 1971 when we were

having our vacation period."

Later on, on page 178, the answer to a question was: "I asked him, I think it was two weeks before he left, I asked him if there was any -- I knew he had adopted this religion a year and a half -- and I asked him if there was any possibility of his being able to change his ideas or anything like that and he told me that he was firmly fixed with his religion.

"Is that when you decided to fire him?

"It was after that."

So the company did not accommodate Mr. Cummins for a year. The fact of the matter is, Mr. Haddock, the plant manager, was there for a year before he was even aware of the fact that Mr. Cummins was not coming in to work.

Mr. Cummins, of course, had been told by previous supervisors that as long as it did not pose any problems he would not have to come in and work on the shift on Saturday. This was based on the past practice of the company, that the particular department that Mr. Cummins worked in, the Banbury Department, historically operated second shifts and they never did have a supervisor.

I think the record amply shows that most of Mr. Cummins' work involved scheduling production and physical presence wasn't always necessary because the company had determined that due to the financial situation they never did have a supervisor on the second shift. And, over the years, the fact that when they did

have one because production was low -- and any problems, any deficiencies in production started back in 1968 and actually reached their peak in 1970 and were totally unrelated to any problems or any difficulties that came about because of Mr. Cummins' adoption of his religion.

I think, secondly, more importantly, is the question of what Congress intended by the enactment of this Amendment and that was to put a burden on the company to attempt to reasonably accommodate the religious needs of the employee.

I do not accept counsel's argument that under -- without this Amendment, Mr. Cummins would not have been protected. I think the argument can be made that under the Griggs doctrine, as applied to religions cases, that this is a policy, a Saturday work policy that as applied to everyone uniformly does have a disparate effect on Sabbatarians, since, historically, this company, as does most of our society, schedules any additional work on the Saturdays rather than the Sundays. And, in this particular instance, in fact, it is even reflected in the contract, since the company has to pay time and a half for Saturday work and double time on Sunday. So, obviously, Sunday work is only achieved as a last resort.

QUESTION: That is uniformly true everywhere, those rates of one and a half and double.

MR. HOGAN: But, in this particular factual situation, I say it is uniformly that most businesses operate on Saturday

versus Sunday, if they've got the choice between the two.

QUESTION: Well, this is a society in which that's been the overwhelming tradition for more than three hundred years, has it not?

MR. HOGAN: Yes, Mr. Chief Justice. And I think that's why Congress passed this statute, to protect the minority Sabbatarians of this country because of the fact that without this amendment, or without the application of Griggs to the original Title VII presciption, there really is no benefit to Sabbatarians or to people who practice a religion that is not of the majority.

QUESTION: Must the employer accommodate every religion, every religionist, including those who have Monday, Tuesday, Wednesday or Thursday as their day?

MR. HOGAN: Well, I think the important thing is, and the amendment, of course, does not apply just to Sabbath worship. It applies to other instances, also, of particular needs of religions.

I think that's why what Congress has created is a balancing factor. In fact, I think they have, in effect, weakened the Griggs doctrine of a business necessity doctrine of saying now there is a lesser standard, that all an employer has to show is that it causes an undue hardship that is directly related to the fact that they are trying to accommodate reasonably the religious needs of their employee.

I think it boils down to, basically, that each case has to be looked at in its own particular fact situation. I don't think that this Court could write a broad, general policy that a particular thing for a company to do will always be sufficient. It would depend on what the total work force is. It would depend on what type of industry it is. It would depend on each factual situation. I think there are cases where allowing someone off on their Sabbath, on Saturday, is reasonable. In the Albuquerque case where it involved the firemen it was impossible to do so. A case where an employee may be able to be demoted or transfered to another plant is reasonable, in one instance. If there isn't another plant, that he can't be transfered and it is a small operation -- but I think these are the issues that are going to have to be determined by the EEOC or by District Courts.

The main thing that the Court of Appeals did in this instance, and the important thing, I think, is that the Commission on Human Rights, who is the actual trier of facts, misapplied the law because they reasoned that as long as this policy was applied uniformly that it was, therefore, legal and that the company was able to do that.

The only problems and the only undue hardship that is reflected in the record and that was testified to is the fact that there was consternation among the other employees, which I think is probably going to be true in most instances,

particularly here where the company did nothing to try to eliminate that problem. The fact is that other employees were working more hours than Mr. Cummins. Mr. Cummins was making as much money as the other supervisors and in some instances more money than some of the supervisors. However, the company seems to say that Mr. Cummins didn't volunteer to do anything. Well, the obvious answer is the other employees didn't volunteer to work 72 hours. The company ordered them to work 72 hours.

Mr. Cummins went to the company at the very beginning and said, "I'll do what's ever necessary. Tell me what to do." They asked him to volunteer, so he did on instances.

Now the question is all the company --

QUESTION: Isn't there testimony that he did not live up to his promise?

MR. HOGAN: Well, the question was -- he volunteered on numerous instances. The question has arisen now, and I think it has mainly arisen in the briefs of the petitioner, is that at one point he stopped volunteering. And I don't think the record does reflect that.

Counsel stated that Mr. Cummins volunteered in 1970, but he did not volunteer in 1971, and on page 153 of the record the question was: "Did Paul ever volunteer to work for you at any other days besides Saturday?"

And the answer, from Mr. Fain: "Well, now when we were in vacation schedule he came over and said, 'I'll help you

out when you need me.'"

Well, vacation schedule was the summer of 1971. The obvious problem Mr. Cummins had is where he had three other supervisors and the company gave him no direction. They expected him to prepare his own work schedule. They singled him out because of his beliefs. They didn't require the other supervisors to prepare their work schedules.

QUESTION: Didn't they also single out the others because of their beliefs in telling them they had to work overtime?

MR. HOGAN: Yes, sir. And, of course, they separated Paul from the group of the other three. The obvious solu --

QUESTION: Who separated them?

MR. HOGAN: The company did.

QUESTION: I thought he did. The company didn't join the church. He joined the church.

MR. HOGAN: No, but -- what I am saying -- when it came to scheduling hours, they scheduled them for 72. And the plant manager even testified: "Yes, we could have scheduled Paul to work four hours in the afternoon, to work twelve-hour shifts during the week to take away from the other supervisors."

But he didn't schedule him to do that because the plant manager felt that the way to solve the problem was for Paul to be a volunteer, for him to go over and offer. And the other supervisors were in the same position and they testified

that they didn't think it was their position to have to go over to another supervisor. They were all looking to the company for some direction.

The company simply had to sit down all four supervisors and say, "Mr. Cummins will not work on his Sabbath, because we are obligated under the law to accommodate him, therefore, let's prepare a schedule to equalize as much as possible."

QUESTION: I thought the Court of Appeals said that he did try -- and as a matter of fact he did for a year, the employer, to accommodate.

MR. HOGAN: Well, this is the argument what the employer did if the supervisors --

QUESTION: No, no, no. Didn't the Court of Appeals say that?

MR. HOGAN: That he was allowed off on Saturdays, yes.

QUESTION: Didn't the Court of Appeals say that the company tried to accommodate themselves to this problem for a year?

MR. HOGAN: Yes, sir. He was allowed off.

QUESTION: Well, you are saying that they didn't. You don't want to disagree with the Court of Appeals, do you?

MR. HOGAN: No. Certainly not.

But, what I am saying as far as now that the company

is saying that this accommodation caused problems, it is difficult to believe that it would have caused problems if the supervisor who was running the plant wasn't even aware of the accommodation.

So, there is testimony in the record --

QUESTION: I think you want us to say that he never accommodated -- the company never did, never tried.

MR. HOGAN: What I am saying is any accommodation -- the fact that Mr. Cummins was not there on Saturday had absolutely no effect on the business operation of this company, that it caused no undue hardship. The only undue hardship in the record at all is the fact that it caused dissension among some of the employees.

And I think that under the statute, that the obligation on the company is to deal with the dissension and not, as they did here ask Mr. Cummins to change his religion.

QUESTION: How can you separate the dissension and the morale problem of the employees, from the accommodation process?

MR. HOGAN: Well, because one of the problems you had with morale was one of the supervisors had formerly been an hourly employee, he was then promoted to supervision and then told to work 72 hours a week. And his objection was not to the fact of what Mr. Cummins was doing, his objection was that he was no longer being paid overtime.

We had a situation here -- and I think this is very important, too -- that was a temporary situation. There was a strike at the other plant which caused increased production. Obviously, the company testified they only worked Saturday when they have to. You had a vacation situation which required the other employees to work additional hours.

I think it is only natural that if one employee is working 72 hours and the other one is working 40 and making the same amount of money, that the one who is working 72 is going to have a little bit of dissension.

QUESTION: What you are saying suggests that this gentleman expected the whole stablishment to revolve around him, to accommodate him, that other employees would have to be imposed upon, one way or another, in order to grant him total freedom from Saturday work. And you say that an employer must simply continue to tolerate that?

MR. HOGAN: Well, that's what I say. It's a balancing factor. You can't just -- you know, there are extremes as to what an employee -- you know, if an employee said, "My religion says I have to have a three-hour lunch period," then an employer can say, you know, "We can't do that."

Here, Mr. Cummins just said he could not work from his Friday sundown to Saturday sundown, but he would do whatever was necessary to make up the additional hours to equalize it. And then the company could have come forthwith and said,

"All right, this is the reasonable accommodation we are offering you."

And, of course, then, if he rejected that then perhaps they would have had a legitimate reason for firing. What they did, they went back to him and they told him, "You work something out."

I don't think that's what Congress intended. The accommodation is on the employer. It is not on the employee. That's where the burden has been put. The company keeps trying to say that this is an equal type of partnership. It only is once the company comes forth, then the burden shifts back to the employee to either accept or reject whatever the accommodation is.

Then, of course, it all has to be viewed in light of the reasonableness and the fact of what undue hardship it will have on the company.

QUESTION: Is that what will bring you up to the constitutional problem?

MR. HOGAN: Yes, Mr. Chief Justice. Since I have yielded ten minutes of my time to the United States, I would just like to touch very briefly on the constitutional issue and let him devote the majority of his time --

And the one important point that I would like to make is that it would seem to me that the company is arguing both sides, that I don't think you can argue that the accommodation

statute is unconstitutional and at the same time say that the basic prohibition of discrimination against religion is constitutional.

I base that on the argument that I think that a proper interpretation of Griggs and the disparate effect cases compel a finding that a reasonable accommodation would have had to have been made.

If a person is in a particular position because of their religion, then I think under Griggs, and assuming that position has no basis to their qualifications to perform the job or to the job requirements, then Griggs would dictate that their religion would have to be accommodated to some extent.

And with that, I will yield to the United States.

Thank you.

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

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

AS AMICUS CURIAE, SUPPORTING RESPONDENT

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

The United States does not agree with the Petitioner that the duty to reasonably accommodate an employee's religious practices, so long as it doesn't cause an undue hardship on the operation of the business, is really a totally separate duty from the basic obligation under Title VII of the Civil Rights

Law to avoid discrimination on the basis of religion. Indeed, the reasonable accommodation requirement was first adopted by the Equal Employment Opportunity Commission in 1967, as an interpretation of the basic obligation five years before Congress amended the statute to indicate its agreement with the Equal Employment Opportunity Commission on this subject.

Under this Court's decision in Griggs, the basic prohibition is directed not merely to the motivation of employment discrimination, but to the consequences of practices on persons because of their race, religion, etcetera, regardless of how well motivated, and even-handedly applied the particular employment practices might be.

QUESTION: Griggs was dealing with employment tests, wasn't it?

MR. WALLACE: It was dealing with employment tests that had a disparate impact, in that case, on the basis of race, and the question was whether the tests were sufficiently related to the business needs of the employer to be a fair measure of employment opportunities or whether the disparate consequences were a violation of the basic prohibition. Similarly, a facially neutral, across-the-board rule that when called upon to do so every employee must work on Saturday, has a grossly disparate impact on certain employees because of their religion.

A similar approach should be taken, under the Griggs test, itself, whether there are sufficient reasons related to

the business needs of the employer to require an employee to be put into the position of having to choose between the dictates of his religion or possibly forfeiting his livelihood.

QUESTION: Well, your case would be more difficult, wouldn't it, Mr. Wallace, if you didn't have the '72 amendment? Aren't you better off to argue on the statute based on the '72 amendment rather than trying to argue something that doesn't help --

MR. WALLACE: Well, our point is that the '72 amendment really represents a reasonable legislative solution to the question of: How do you determine when a practice has the forbidden consequence of an employment practice that discriminates on the basis of religion? It's not simply a motivational question.

And Congress recognized that in adopting the 1972 amendment in light of EEOC's experience in trying to make that determination in these cases where persons complained that they were being forced to the choice between the dictates of their conscience and the employer's demands that they observe a facially neutral employment requirement.

So, it is an outgrowth and a reasonable legislative drawing of the line to determine when an employment practice is justified in terms of the needs of the business, or when it has the forbidden consequence because of its disparate impact on the persons --

QUESTION: What's your idea of whose burden this accommodating business is? Don't you think an employer -- the man has been working for years on Saturday, then he comes in and says, "I'm sorry, I've joined the church and I can't work on Saturday any more." Now, does he have some job, some responsibility of suggesting how this can be done?

MR. WALLACE: Well, he is not managing the plant. If you say --

QUESTION: But he's the one who joined the church.

MR. WALLACE: That is correct, but --

QUESTION: He brought the issue up.

MR. WALLACE: The statute says that the employer is to make a reasonable accommodation to the religious practices --

QUESTION: So the burden is on the employer.

MR. WALLACE: -- of the employees. That's what the statute says. And, quite properly so, because it is management that makes the decision as to how working hours can be arranged so as to reasonably accommodate the needs of these employees or how they cannot be.

And that is the approach --

QUESTION: When the man is on an annual salary, it is a little different problem.

MR. WALLACE: In this case, as I read the record in this case, --

QUESTION: Suppose a man is being paid so much money to work six days a week during the whole year, and then he joins a church and he gets 52 days off with pay, just like that. Isn't that right?

MR. WALLACE: That is not what the statute requires the employer to do. It could be the result that the employer could accept in a particular case, but the statute does not --

QUESTION: What else could the employer do?

MR. WALLACE: Well, in this case, --

QUESTION: In my case, what else could the employer do?

MR. WALLACE: If there was no possibility of substituting additional longer working hours because of the nature of the business, on other days, then, the only other possibility would be to negotiate an appropriate reduction in salary, based on the reduced work hours of the particular employee.

The circumstances of the case will dictate what can be a reasonable accommodation, and there can be several possibilities for reasonable accommodation.

As I read the record in this case, I think the company did, to the extent it was aware of the problem, make a reasonable accommodation for the initial period in which the Respondent here started to observe Saturday as his Sabbath.

It was only during the summer of 1971 when the increased workload came along due to a strike in the Lexington

plant and vacation schedules in the plant that the company really didn't fulfill its obligation by making further adjustments to utilize the Respondent and have him carry his full share of the extra workload, along with the other supervisors.

As Mr. Hogan said, the other supervisors were assigned the duties that they had and were told when they would have to work on Saturday to cover for Mr. Cummins, etcetera. Yet the company refused to assign Mr. Cummins to extra work during the week to cover for the other employees, where it could very well have equalized the assignments out by giving Mr. Cummins extra hours during the week and if those extra hours were on the second shift, then have the second shift supervisor sometimes relieve the first shift supervisor. So that all of them could have had some relief.

QUESTION: It is a great deal easier, Mr. Wallace, to say that in an appellate argument than it is to adjust the functioning of a plant and the work on a floor with numerous employees. It isn't all that easy, the way you describe it.

MR. WALLACE: There could have been difficulty existing there but if there were it was up to the company to bring them to the attention of the finders of fact in the case, and it did not do so. What appears on the record is that it was common practice in that company for the Banbury Department, of which Mr. Cummins was the supervisor, to operate without a supervisor of its own, to have that job covered by others and

that it was common practice for supervisors to substitute for each other on occasion.

QUESTION: What did the District Court find in this case?

MR. WALLACE: Well, the District Court made no findings of fact. The case was submitted to the District Court on the record that had been developed before the State Commission, and the District Court read a very short opinion which merely says that on that record it found that the company had made a reasonable accommodation and no more should be required of it.

And so, the Court of Appeals, quite properly, had to look to the underlying facts to determine whether applying proper legal standards to those undisputed facts, that result was correct or not, and reached the conclusion that the District Court erred in that regard.

The only findings that we have are reflected in the Court of Appeals opinion. But nothing was brought out in the hearing as to any reasons why the company could not have made assignments of that sort.

In the limited time remaining, I'd like to say a few words about the constitutionality of the 1972 Amendment to Title VII.

There is no general principle under this Court's decisions that it is necessarily a violation of the Establishment

Clause for one person to be required to adjust his conduct in some way because of the religious practices or observances of another.

In fact, this Court's decisions hold precisely the opposite, that it is appropriate as an exercise of legislative power in particular circumstances to require individuals to adjust their conduct in a way that will further in a neutral way the free exercise of religion and avoid unnecessary clashes with religious conscience.

One example of that, a rather simple one, is Galligher v. Crown Kosher Markets, one of the Sunday closing law cases in which eight justices upheld against an Establishment Clause attack the constitutionality of provisions of that particular Sunday closing law which forbad the carrying on of certain activities within a prescribed distance of the place of worship on Sunday. This affected where people could parade. It affected where people could conduct athletic events, all in deferance to furthering the free exercise of religious observances at the churches that were being protected.

This Court held that this does not force anyone else to attend those services, to adopt any kind of religious beliefs or practice and that it was a permissible exercise of State power to reach other persons in this way in order to protect the free exercise of religion.

Another example of that which we develop in our brief

at some length, is Zorak v. Clausen, in which those school children who did not choose to attend the religious instruction given outside of the schoolroom were kept in school, the regular attendance, even though the State forbad continued instruction during that period which would cause educational problems and cause those who stayed behind to forge ahead of their classmates.

In dissent, Mr. Justice Jackson went so far as to say the school is being used as a jail for those students who chose not to go to church in those circumstances.

Nonetheless, that was upheld. And probably the most extreme example is the Court's upholding of the constitutionality of the conscientious objector provisions of the Selective Service laws, even though they necessarily mean that some people will be conscripted into military service in place of those who are the conscientious objectors, or will be sent into combat in place of those who object to that kind of military service, based on their religious scruples.

This kind of accommodation has been called in opinions of this Court "among our finest traditions," and is not really different in kind from the adjustments that were made by the clerk in the argument schedule of the Court last week and this week because of religious holidays, in rearranging some of the oral arguments of the Court.

QUESTION: Doing that once in four or five or, perhaps,

more years is quite different from having to adjust work schedules day by day and week by week, is it not?

MR. WALLACE: These are all matters of degree, Mr. Justice, and I do want to say that the Courts of Appeals have upheld the undue hardship in the operation of the business defense in a number of instances in the context of this kind of claim. I don't think the facts of this case come close to the difficulties that were shown there. There was no extra expense to the employer here. Cost is a factor that is taken into account. The availability of substitute employees, the affect on other employees, the possibility of having to be on call for emergency service, factors of that sort have been reviewed in the opinions.

QUESTION: Mr. Wallace, in this case, however, we are dealing with a statute providing for equal employment, and the cases we usually have, of course, involve alleged discrimination with respect to pay or promotions.

Now, the Petitioner here has not discriminated against Mr. Cummins. What the Petitioner wants is not equal treatment. He wants preferred treatment. And it is a little curious to find the provision of the Statute, 701, that uses the term "discrimination" in a context that results in the argument being made here that because the employer accords equal treatment to Mr. Cummins the company that employs the employee is charged with discriminatory practice.

The question I lead up to ask is: Whether or not in connection with your constitutional argument the employer is really not being compelled by law to accord a privilege, a benefit, to an employee because of his religious choice or preference?

MR. WALLACE: Well, the treatment that has been accorded is facially equal treatment, just as Mrs. Sherbert was afforded facially equal treatment by South Carolina in refusing her Unemployment Compensation benefits, along with anyone else who refused to take a job that required work on Saturday. Some people might have preferred to be at home with their school-age children, etcetera. There may have been substantial reasons why they refused to take such employment.

But, if the dictates of one's conscience, one's religion, forbid working on that day and leave the person with no conscientious choice, you are into a situation where the facially equal treatment has grossly disparate effects on individuals and causes a great hardship of having to choose between the dictates of one's most deeply held beliefs and one's livelihood.

There is an area where the legislature, I think, quite properly, can go behind facially equal treatment to see if there aren't ways of accommodating people so that they can carry their full share of the work responsibility and still not have their beliefs compromised in this way, in comparison with

others who might be observing their Sabbath on a day when the company ordinarily does not require them to work. They may not be faced with the same problem at all.

It's an area that has required difficulties in adjustment before the 1964 law was enacted. Those difficulties were faced by employers in making ad hoc decisions, and they were faced in the collective bargaining process, and as part of the 1964 concern with equality of employment opportunities, Congress has stepped into this field in exercising its commerce power.

MR. CHIEF JUSTICE BURGER: I think you have completed your answer to Justice Powell, Mr. Wallace.

Your time is up.

Thank you.

Mr. Becker, do you have anything further?

REBUTTAL ARGUMENT OF LEONARD H. BECKER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BECKER: If it please the Court, unless there are questions by the Court, I have nothing to add to my prior statement.

QUESTION: What if the Civil Service Commission had adopted precisely this sort of a regulation to be applicable to Government agencies? Would you say that violated the Establishment Clause?

MR. BECKER: There, I think, once again, Mr. Justice

Rehnquist, we would be in the posture that the Government, in order to avoid infringement upon free exercise would have to make allowances. But that's because it's the Government which is the employer in that case.

QUESTION: Your client certainly has no Establishment clause or Free Exercise clause. It is a corporation. All they can do is raise the free exercise claims of the other employees. And I would think the other Government employees would have just the same kind of a claim that the other employees of Parker Seal do if the Civil Service Commission made that sort of a regulation.

MR. BECKER: There are several points to be made in response.

First is, that the company does have a right to challenge the statute under the Establishment clause. Of course, the company does not have an independent free exercise claim, nor are we here today asserting, on behalf of some third person, any free exercise claim.

But the company is coerced by Government to undertake activity with respect to and in favoritism of a private person's religious activities. And that gives rise to an Establishment clause objection here.

The second point is that the Government is a much larger employer than the Berea, Kentucky, plant of Parker Seal. And to the extent that we deal on the statutory plane, at least,

each of these cases must turn on the number of fundable employees who may possibly be substituting for one another. That was not a possibility here where we dealt with a limited number of supervisory personnel.

On the constitutional plane, I adhere to my answer that the Government must make allowances as it did in the conscientious objector cases where a failure to make such allowance would give rise to a substantial problem under the Free Exercise clause.

This was the point Mr. Justice White made in his dissent in the Welch case. It is the essence of the Yoder decision of this Court.

There is a difference when the Government is the employer.

QUESTION: Mr. Becker, have any of the cases in this area involved situations where the accommodation required a violation of a collective bargaining agreement?

MR. BECKER: Yes, Mr. Justice Powell, there are cases which, I believe, are now pending in this Court on certiorari which involve questions arising in such circumstances.

QUESTION: There is one I recall in the Circuit which raised the question, but I don't think it was involved in the case directly. Has there been a square holding anywhere?

MR. BECKER: TWA case does -- the question is reserved. I hesitate for this reason, Mr. Justice Powell.

The question is ostensibly reserved by the Court of Appeals in TWA, although you have before the Court a petition from the union which says that the question can't possibly be reserved because in order to carry out the mandate of the Court of Appeals, it would be necessary to alter the seniority agreement which the company has with the union.

In TWA, the fellow transfers from the night shift to the day shift, loses seniority,as a result is forced to take on Saturday work and objects and the question presented there is whether the union can be required to modify the collective bargaining agreement in order to accommodate this employee.

QUESTION: This question was reserved in Yott v. North American Rockwell Company.

MR. BECKER: Well, in Yott, I believe, the case was returned to the District Court, if I recall correctly, to consider whether it is possible that an employee who declines to pay his union dues can, nonetheless, somehow or other, be accommodated.

The Court of Appeals said that it didn't have any idea of how this fellow might be accommodated, but sent the case back to the District Court to see if they could figure out a way.

QUESTION: They are a union shop, there.

MR. BECKER: I am sorry.

QUESTION: There was a union shop in that case.

MR. BECKER: Yes, that's correct.

There is a similar case, a recent decision by the Fifth Circuit, Cooper v. General Dynamics, where a similar problem is presented.

QUESTION: Mr. Becker, if this law is bad, why wouldn't the law be bad which simply said that the employer could not discriminate on the grounds of religion?

MR. BECKER: There, I think, Congress can justifiably purge the channels of Interstate commerce of an obstruction. The same reasoning that applied in Griggs would seem to me to carry forward there.

QUESTION: I know, but let's talk about it on the Establishment clause grounds.

I suppose you would argue that the statute requires the employer to avoid firing a person or refusing to hire him on account of his religion, and the aim of it, the purpose of it, surely is to aid religion.

MR. BECKER: No, I wouldn't say it was. I would say it's for a different purpose. There is an overriding secular purpose in a statute which seeks to purge channels of Interstate commerce of irrational acts of employment which tend to cut out of the job market certain people on the basis of irrational and irrelevant considerations.

That's at the heart of the Griggs decision --

QUESTION: And you don't think that would reach this

case? They just want to clear Interstate commerce of religious discrimination which can reasonably be avoided?

MR. BECKER: There isn't a scintilla of evidence in the record here or before Congress that Congress had that purpose in mind.

Now, if Congress came back with a statute which said: We have conducted hearings and we have found that there is --

QUESTION: On my other example, if you couldn't find a scintilla of evidence as to what the purpose was, you would strike it down, just like you would this one.

MR. BECKER: No, I don't believe I would. I would say that a statute which seeks to purge channels of Interstate commerce of discriminatory conduct --

QUESTION: I heard you the first time. I don't know why that doesn't reach this case, too.

MR. BECKER: Because, there is no indication --

QUESTION: Because there is no evidence, you said.

MR. BECKER: Well, also because the language of the statute itself makes it clear that Congress was not concerned about discrimination here. It was not concerned that it needed to tighten up or toughen up the basic anti-discrimination provision of Title VII because it had uncovered a weakness in the original statute. The purpose of this statute is to help certain people out precisely and solely because of their

particular religious circumstances.

QUESTION: How do you explain the EEOC guideline in 1967 which was promulgated under the basic statute and then Congress ultimately adopted? That sounds like evolution rather than a brand new thought coming into Congress' mind.

MR. BECKER: There is no question, Mr. Justice Rehnquist, but that Congress was inspired by the 1967 guideline. The problem was that the guideline itself had been challenged repeatedly in the courts as not properly promulgated under the original statute.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:00 o'clock, p.m., the case in the above-entitled matter was submitted.)