ORIGINAL

In the

Supreme Court of the United States

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, et al.,	)	
Petitioners,	)	
v.	)	No. 78-753
JOHN R. NOVOTNY,	)	
Respondent.	)	

Washington, D. C.
April 18, 1979

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v.	No. 78-753
JOHN R. NOVOTNY, Respondent	

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April 18, 1979

The above-entitled matter came on for argument at 10:59 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
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:

EUGENE K. CONNORS, ESQ.,
Pittsburgh, Pennsylvania
On behalf of Plaintiffs

STANLEY M. STEIN, ESQ., Pittsburgh, Pennsylvania,
On behalf of Respondents

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.
(amicus curiae).

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C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Great American Federal Savings & Loan Association v. Novotny, 753.

Mr. Connors, I think we may proceed whenever you are ready.

ORAL ARGUMENT OF EUGENE K. CONNORS

On BEHALF OF PLAINTIFFS

MR. CONNORS: Mr. Chief Justice and may it please the Court: This case is here on a writ of certiorari to the United States Court of Appeals for the Third Circuit.

This case was brought under two Federal statutes: The first statute is Title 42, U. S. Code, Section 1985(c). Previously it was codified as 42 USC 1985(3). It is more popularly known as the Ku Klux Klan Act of 1871, passed on April 20th of that year.

The second Federal statute under which this suit is brought is Section 704(a), the so-called retaliation provision of Title VII of the Civil Rights Act of 1964. It is a suit brought by a person named John Novotny, a former second ranking official of a Pittsburgh Savings and Loan Association.

It was brought against the Association and its individual officers and directors. The facts alleged are that the Association and its individual officers and directors

discriminated against women in promotions and other aspects of employment. Mr. Novotny allegedly protested against this at a Board of Directors meeting. His Title VII cause of action is grounded on the allegation that his subsequent discharge resulted from his protest at the Board of Directors meeting and, therefore, was opposition against a practice made unlawful within the meaning of Section 704(a).

That cause of action, incidentally, was brought against both the Association and the individual officers and directors. The 1985(3) cause of action is grounded upon the allegation that the individual officers and directors acting at all times on behalf of the Association conspired to deprive women of their Title VII rights and acted further in conspiracy in Mr. Novotny's discharge.

A Motion to Dismiss in the District Court was filed and granted as to both causes of action. The Third Circuit, however, sitting en banc reversed as to both causes of action. Certiorari was sought and granted only on the 1985(3) cause of action. Therefore, Mr. Novotny's Title VII retaliation cause of action against both the Association and the individuals will survive irrespective of the outcome in this Court.

The issues, as we see them, are three: whether a deprivation of Title VII rights is a deprivation of equal privileges and immunity under the laws within the meaning of

1985(3). Secondly, whether agents of a corporation, acting only on the corporation's behalf, can conspire within the meaning of 1985. And, thirdly, and lastly, whether Congress under 1985(3) intended to reach sex discrimination in private employment, through the commerce clause or otherwise.

The language in 1985(3) material to this case grants a Federal remedy when two or more persons conspire for the purpose of depriving a class of persons of equal privileges and immunities under the laws. It grants a civil cause of action to a person injured in his person or property or deprived of any right or privilege of a citizen of the United States.

We will lead to our first issue to determine whether Title VII grants equal privileges under the laws. We believe it is most appropriate to see what the effect of the Third Circuit's opinion is on the workings of Title VII, which is the right allegedly being asserted under 1985(3) here.

Through Title VII, Congress has created certain rights to be free from discrimination in private employment, including, for the first time, effective July 2, 1965, sex discrimination. At the same time Congress created what in Section 706 is the exclusive procedure for asserting and enforcing these Title VII created rights.

According to Mr. Novotny and the Third Circuit, however, 1985(3) made Title VII's administrative judicial

procedures permissive at the very moment of its creation.

A person deprived of any Title VII right whatsoever can bypass Title VII. Congress has carefully designed, carefully thought out administrative judicial framework with its emphasis on conciliation and with specific time limits deferral provisions all can be easily subverted.

The Equal Employment Opportunity Commission or a State Fair Employment Practice Agency, the Agency charged by Congress with expertise in these matters that are supposed to take a very active role in conciliation persuasion within the framework of administrative processes of Title VII can be avoided. Alternatively, of course, a person under the Third Circuit's reading of 1985(3) can proceed through the administrative processes of Title VII and ultimately perhaps the Federal Court and at the same time proceed immediately to Federal Court under 1985(3), creating a very real possibility of conflicting erroneous inconsistent decisions. This situation is different from what this Court decided in the Johnson v. Railway Express Case.

Johnson involved a preexisting, independent right to sue under Section 1981 of Title 42.

In this case, we are talking about 1985(3) being read to take a right created by Title VII and thereby invalidate the administrative processes under which that Title VII created right was to be asserted and enforced.

In addition, despite the Third Circuit's disclaimer that 1985(3) would not apply to anything beyond equal employment opportunities, there is no holding back the thrust of the Third Circuit's opinion. The logical thrust of that opinion is to extend 1985(3) to any Federal substantive statute irrespective of whether such a statute has its own administrative framework and irrespective of whether Congress decided and designed it to be handled exclusively through its own administrative processes. We would have in this Court and other Courts a needless flood of duplicative litigation under such laws as the National Labor Relations Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Equal Pay Act, the Labor-Management Reporting & Disclosure Act, the Age Discrimination in Employment Act, and we can multiply that by 10s and 20s and 30s and 40s.

In our view, however, that chaotic unreasonable result is unnecessary.

QUESTION: I didn't quite follow your argument. I didn't read the Court of Appeals Opinion as going quite that far, did you?

MR. CONNORS: Mr. Justice Stevens--

QUESTION: They emphasized the word "equal".

MR. CONNORS: Yes, they did. But I believe under these statutes you can read the word "equal" in such a way that it can apply to these and other sources of laws.

QUESTION: Did anybody ask it to do that?

MR. CONNORS: The Third Circuit's logic, I believe, compels the Court to draw some sort of a line between rights are assertable under 1985(3)--

QUESTION: What if we drew the line to be the kind of thing that would be bad if it were done by a State Agency in violation of the equal protection clause? That's sort of the thrust of what they say I think.

MR. CONNORS: I'm not sure I read the Third Circuit's opinion to say that. I see the logic of the Third Circuit's Opinion to reach any Federal law that creates a right, assertable in Federal court, irrespective of whether it is otherwise assertable within the framework of that law.

QUESTION: We realize the Opinion here, but we're passing on the judgment, aren't we?

MR. CONNORS: I understand, Your Honor. We believe, however, that chaos is unnecessary and the unreasonable result is unnecessary because the legislative history makes clear and the draftsmen and the sponsors of 1985(3) make clear that 1985(3) is a remedial statute. In fact, the Third Circuit specifically quoted from both Senator Edmonds, who was the Floor manager in the Senate for 1985(3) and, of course, the Ku Klux Klan Act, and also Representative Shellenberger. The Third Circuit's quotes from these two individuals appear at pages 27(a) and 29(a) of the Court's Opinion as produced

in the Cert petition.

1985(3) does not stand on its own. It needs a right from another source. It's a remedy in search of a right. For that reason, it is unlike such laws as 1981 or Title VII, which are substantive statutes combining both a right and remedy, and that is the distinction between 1985(3) and, for instance, 1981.

Admittedly, the phrase "laws" in 1985(3) appears all-inclusive. But the legislative history makes clear that Congress was creating a Federal remedy and a Federal forum to assert rights, Federal rights where none previously existed. It was a need-filling statute.

The Ku Klux Klan Act was finally passed in 1871 by Congress because Congress learned from painful experience that it wasn't enough to just create laws -- create rights under, for instance, the Thirteenth, Fourteenth and Fifteenth Amendments saying that citizens had certain rights.

The States and individuals, as recognized in the Griffin Case, were unwilling to protect and respect such naked rights, unassertable rights. Under 1985(3), Congress made, for the first time, such previously unassertable rights assertable in Federal Court. 1985(3) was and, therefore, is a gap-filling statute to fulfill a particular need. It wasn't designed to supplant or replace other carefully thought out legislation which stands on its own like Title VII.

It was meant to apply where an existing remedy either did not exist or was not being enforced. Additionally, in 1985(3) the phrase "equal privileges" is mentioned -- equal privileges and immunities under the law.

We are talking here about sex discrimination. Not every citizen has a Federal right to be free from employment discrimination under Title VII, and that's the right we are talking about here. For instance, only employees who are employed by employers employing 15 or more individuals have a Federal right to be free from sex discrimination.

In other words, since not every citizen has a right, a Federal right to be free from sex discrimination, in our view, freedom from sex discrimination is not equal, with an accent on equal privilege and immunity because it isn't extended to each and every citizen.

QUESTION: But wouldn't the Third Circuit's answer to that be that with respect to all persons employed by employers of 15 or more persons it is a right to equal treatment?

MR. CONNORS: The Third Circuit may well say that, but if we go a little bit farther in the language of the statute it says in order to assert a civil cause of action under 1985(3) a person must be injured in his person, in his property or deprived of a right of national citizenship. And I submit that you do not have the right of national

citizenship to be free from sex discrimination since all citizens do not have that right.

Griffin recognized the possibility that courts could read 1985(3) to be the panacea it was not and cautioned against reading 1985(3) as a general tort law. We believe the Third Circuit's over-broad analysis and construction of 1985(3) creates a general Federal tort law despite the language in, for instance, Griffin, which talks about having to establish under 1985(3) an invidiously discriminatory class-based animus.

We submit that whenever you violate Title VII, you automatically have class-based animus, because we have created -- Congress has created certain protective classes, such as sex, national origin, race, et cetera, under Title VII. You automatically would have class-based discrimination. Invidiously discriminatory, I'm not sure exactly what that means. I do know from the Screws Case and from the footnote in the Griffin Case that it does not mean specific intent. So it means something less. And it may very well mean something as simple to prove and automatic to prove as people intended the logical consequence of their action.

And, thirdly, since we are dealing here with a corporation -- but it doesn't make any difference whether it's a corporation or not -- I would submit that virtually decision to discharge someone or not to hire someone has a

legal plurality of personalities involved. In other words, at least two people have had input into that situation. And if you have two people having input, you have a conspiracy. At least two.

QUESTION: I thought it was two or more.

MR. CONNORS: Two will be fine, Your Honor.

QUESTION: It's not that important to me; I'm sorry.

MR. CONNORS: We feel that the only sensible way to read laws within the meaning of 1985(3) are laws creating rights not otherwise assertable without 1985(3). In other words, as a gap-filling statute as the 1871 Congress fully intended. There are court cases that go beyond that position, and I refer to that view as the broad view. Those court cases confine the wrong word. They say 1985(3) covers rights which came into existence after 1871, including statutory rights. And we submit that under our view of the statute, even if this Court takes that view, this case ought to be dismissed as to the 1985(3) cause of action simply because if the laws that were created after 1871, including statutory rights -- creating statutory rights -- are not otherwise assertable without 1985 -- they are covered under 1985(3) but that, by no stretch of the imagination, is Title VII.

We believe, however, the correct reading of 1985(3) is the reading that takes the statutory construction from the language of the statute itself.

QUESTION: Do you suppose you would have needed the 1983 at all in the Griffin Case? In Griffin against Breckenridge, couldn't the suit have been brought directly under -- couldn't the suits have been brought directly asserting rights under the Thirteenth Amendment and the Constitutional right to travel interstate?

MR. CONNORS: I don't believe so, Your Honor. I would characterize Thirteenth Amendment rights standing alone and not otherwise implemented by law or the right to interstate commerce as a naked right not otherwise assertable.

QUESTION: I know it's not otherwise assertable. Look at the Bivens Case, for example. Are you familiar with that case?

MR. CONNORS: That's Bivens v. the six unknown--

QUESTION: Yes. And that was a direct action under the general jurisdictional statute 1331, I guess.

MR. CONNORS: That involves State involvement.

QUESTION: But it was a direct action under a right directly given by the Fourteenth Amendment.

MR. CONNORS: I believe when we have State or Federal involvement though, Your Honor, we're talking about a different--

QUESTION: In that case, the Fourth Amendment.

MR. CONNORS: That's right, the Fourth Amendment, but we are talking about a different situation here.

QUESTION: We're talking about rights conferred by the Federal Constitution.

MR. CONNORS: Yes, we are.

QUESTION: And among those rights is the Thirteenth Amendment right of Negroes not to be treated different from other people, and the right of everybody to travel interstate without interference. Now, those are two clearly-established Constitutional rights. Couldn't an action have been brought in the Griffin Case without invocation of 1985(3)?

MR. CONNORS: Not without State involvement, Your Honor. Precisely--

QUESTION: Neither one of those requires State deprivation. It's deprivation by anybody. The Thirteenth Amendment abolishes involuntary servitude. An dit doesn't say that private people can carry on involuntary servitude after that but only States are prohibited from doing it. And the interstate right to travel is a right assertable against anybody, not just against Government.

MR. CONNORS: I submit, Your Honor, it is not assertable unless there is a Federal remedy such as 1985(3). And I believe that is exactly the problem that Congress grappled with in the legislative history underlying 1985(3). Several people spoke to the issue, I guess first promulgated by James Madison in the Federalist Papers that the creation of a right implies a remedy. Several opponents of 1985(3) said,

"Why do we need do anything. We have a Federal right." It implies a remedy, as James Madison said. Why don't we just go ahead and let people come into Federal Court and assert those rights even though we don't have a remedy. And the very telling point made immediately after that argument, and I have forgotten the gentleman's name, but he said, "That's all well and good. We created those rights in the Thirteenth and Fourteenth Amendment, but that didn't stop two very close friends of mine from being shot down in the State of Florida." We need something that specifically tells people that they have a remedy in Federal Court to assert what we believe is an unassertable right.

QUESTION: Do you agree with others who did research during that period that you didn't know what was going on when one man would say yes today and no tomorrow, and sometimes the same afternoon?

MR. CONNORS: There was a fair amount--

QUESTION: That the only way you could do it would be to measure it and put it on two sides as to how many times he said yes and how many times he said no?

MR. CONNORS: There is a certain amount of ambivalence on the part of the statesmen at that time. I believe the fact--

QUESTION: This Court said so in the Brown Case.

MR. CONNORS: Yes. But I believe the decision on the

part of a majority of the Congress, both the Senate and the House of Representatives, was we need to show and tell people that they have a Federal remedy where you have naked Federal rights.

Here it is, Section 1, which is 1983, and here is Section 2 which is now 1985(3) of the Ku Klux Klan Act.

QUESTION: Mr. Connors, do you take the view that you believe the two sections which are now 1983 and 1985(3) protect the same bundle of rights?

MR. CONNORS: I do not, Your Honor. And the reason why -- and I'm going to make one additional point, I would also say a criminal counterpart of 1985(3), which has now been codified as Title 18, Section 241, is more broad than 1985(3), and that's because 1985(3), unlike 1983, and unlike Section 241, goes on to say that in order to assert a civil cause of action, a person has to be injured in his person or property or deprived of a right of national citizenship. That language does not appear in a criminal counterpart and it also doesn't appear in 1983, which is Section 1 of the Ku Klus Klan Act. And that's why I think this case basically is a case of statutory interpretation and construction.

QUESTION: Well, if you're arguing that the party so injured language narrows the statute, I should think you would have argued that the Plaintiff being male was not a member of the class being injured. You didn't make that argument.

MR. CONNORS: That argument was made both in the District Court and the Circuit. Since the case came down 9 to nothing I suggest that the Third Circuit was not persuaded by that argument.

QUESTION: They really weren't persuaded by anything.

MR. CONNORS: I agree fully, Your Honor.

Our position is that that language that follows that only is contained in 1983(3)--

QUESTION: They also weren't persuaded by what I wrote.

MR. CONNORS: I consider myself in good company, Your Honor.

But our position is that that language that follows, the special language that follows in 1985(3) tells us really what Congress intended to reach so far as rights are concerned, as far as the civil conspiracy remedy now set forth in 1985(3) or (c), however you would refer to it. And that view, as I said, is taken from 1985(3) itself. It says specifically that the civil action is available only to a person injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Statutory rights are not mentioned by 1985(3). In this case, Mr. Novotńy has alleged no injury to his person and I submit that no one under a situation like this has injury to his person or a deprivation of a property right. There is no

property right to a job. And, thirdly, there is no deprivation of a right of citizenship. As I said earlier, Title VII does not give an untrammeled right to every citizen to be free from sex discrimination.

QUESTION: Mr. Connors, you haven't quite said it, or if you have, I missed it, but is it your position in net and in sum that 1985(3) protects or authorizes the assertion only of Constitutional rights, not statutory rights?

MR. CONNORS: Yes, Your Honor.

QUESTION: Even if the statute is specifically passed to enforce the Constitution?

MR. CONNORS: We are talking about Constitutional rights though, Your Honor. All I am saying is that's what the statute says.

QUESTION: Wasn't Title VII passed specifically to enforce the Constitution?

MR. CONNORS: Those naked, unassertable rights under the Constitution.

QUESTION: Now, where do you say the statute says that, excuse me?

MR. CONNORS: Where it says a person has a civil remedy when he is injured in his person or property or deprived of any right or privilege of a citizen of the United States. The phrase "rights or privileges admittedly, are terms of art, the draftsmen in the House, and the Floor manager,

Representative Shellenberger, talks about privileges, immunities and says that they are fundamental rights, inherent in citizenship of the United States, as derived from the Constitution. And a little bit later in the legislative history, Representative Kerr, I believe from Illinois, said, "I understand what you are saying about privileges and immunities being fundamental rights of citizenship derived from the Constitution, but in your first draft you've got rights, privileges and immunities."

And Mr. Shellenberger, a couple pages later, finally got around to saying, "That's right. Rights are derived--"

QUESTION: But nobody had any before the Fourteenth Amendment. Nobody had citizenship before the Fourteenth Amendment.

MR. CONNORS: That's correct, but we're talking about the Fourteenth Amendment having been passed by that time.

QUESTION: Well, at that time, a woman wasn't a citizen -- at least she couldn't vote.

MR. CONNORS: She couldn't vote, but she was a citizen, Your Honor. Women did lack a lot of the attributes of citizenship at that time.

QUESTION: A native born female would come under the Constitutional definition of the Fourteenth Amendment of a citizen?

MR. CONNORS: Of a citizen, yes, admittedly --

admittedly, Your Honor. Yes, Your Honor.

QUESTION: It's true, of course, Griffin v. Breckenridge did involve only Constitutional rights--

MR. CONNORS: Yes, Your Honor, Thirteenth Amendment and the right to interstate travel.

QUESTION: And Collins v. Hardyman involved an asserted Constitutional right. The right to petition, wasn't it?

MR. CONNORS: Petition to Government to redress grievances, yes, Your Honor.

QUESTION: So your submission is that 1985(3) authorizes lawsuits to protect only rights conferred by the Constitution.

MR. CONNORS: And injury to persons or property, to the extent that it arises under the Constitution, yes. But we are saying that even though that's our view which is taken from the statute, even if this Court takes the broad view taken by other Circuits and District Courts, this case can also be dismissed because the Congressional intent was only to apply 1985(3) where the right was not otherwise assertable. And Title VII, of course, is otherwise assertable. So this Court has its choice.

QUESTION: Not by the Respondent in this case.

MR. CONNORS: He did assert his Title VII rights within the context of Title VII. He filed a charge, and his Title VII action is brought against both the Association and

the individuals, and that will survive.

QUESTION: You told us at the outset.

MR. CONNORS: Yes, Your Honor.

As we pointed out, to determine -- moving to our second issue since I see my time is fast moving -- to determine whether corporate agents, acting on a corporation's behalf, can conspire under 1985(3), we must recognize, first of all, how a corporation really acts, exclusively through its agents, incapable of acting without them. That's why a corporation is only one person under the law. Next we must see if under 1985(3) there is any need to disregard how a corporation really acts. And we say there is no need for several reasons. First, because under Title VII, the corporate veil can be pierced in the classic sense where a corporation is a shell without assets or erected for an unlawful purpose.

Also under Title VII, an agent can be held individually liable. In fact, the Solicitor General has cited a few cases in his brief to that effect, and that's taken from the definition of Section 701(b), which defines an employer and the corporation and any of its agents. Under principles of tort, agents can be held individually liable as joint tort-feasors. Through principles of respondiat superior, a corporation and its agents are already exposed to liability, much as the individual conspirators are exposed to liability in a civil conspiracy context. We say there isn't any need to

punish, to get out and punish the conspirators because 1985(3) creates a civil conspiracy. And it's only a criminal conspiracy that is out to punish individual conspirators. That's the job of Section 241 of Title 18.

We also say that to rule otherwise and say that a corporation can conspire with its agents could very easily chill collective action, the very life blood of a corporation. And, finally, the Dictionary Act, which was passed on February25, of 1871, mere days before 1985(3) was drafted, defined the word "person" to include a corporation, as noted in this Court's Minnel decision, to include a corporation within the framework of the definition person unless the context of the statute clearly indicates a more limited definition.

MR. CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. CONNORS: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Stein.

ORAL ARGUMENT BY STANLEY M. STEIN

ON BEHALF OF RESPONDENTS

MR. STEIN: Mr. Chief Justice and may it please the Court: I represent an individual who, after 25 years of service with the same corporation, held the position of high responsibility. He was second in command in that corporation, had no previous questions raised regarding his competence or

his loyalty and, nevertheless, was fired on January 22, 1975 after having been engaged in efforts to support claims and complaints made by women employees of the bank for which he worked, that they had been discriminated against over a period of time and were continuing to be discriminated against.

He supported them verbally in a meeting of the Board. He supported them with his vote, and voted against action taken by all of the other members of the Board, and he was in an extreme minority in his actions, did not side with "Management" and, for that reason, and that reason alone, we would submit he was fired.

He immediately filed a charge with the Equal Employment Opportunity Commission and two years later a right to sue letter was issued to him. The longstanding history of inferior treatment which we would have been prepared to prove had we ever gotten past the Motion to Dismiss, included women being paid less for the same work; receiving fewer promotional opportunities--

QUESTION: Mr. Stein, could I interrupt with just one question?

MR. STEIN: Yes, Your Honor.

QUESTION: You have alternative theories in the District Court, one under Title VII and one under 1985(3)?

MR. STEIN: Yes, sir.

QUESTION: If you prove the facts you are just

describing to us, you, presumably, would recover under Title VII. Do you need to prove any less to recover under 1985(3)? Is there any difference in the evidence that has to be presented by you to recover under one rather than the other?

MR. STEIN: Yes, I think I would have to prove under 1985(3) that the discriminatory actions on the part of the members of the Board were intentionally undertaken for the purpose of invidiously discriminating against a group, or class--

QUESTION: Don't you need to prove that in order to recover for the man under Title VII? Don't you have to prove precisely the same thing?

MR. STEIN: No, not necessarily. I don't know that I would have to prove any more than they fired him because of his particular advocacy. I don't know that they have to have had an actual discriminatory animus against the women who they discriminated against. And it may be that I will want to prove that--

QUESTION: What do you mean by "discriminatory animus"?

MR. STEIN: Well, that their intention in firing him was because they had -- they were subjectively opposed to women's rights, they subjectively intended--

QUESTION: You have to prove their motive.

MR. STEIN: Yes.

QUESTION: An evil motive against women.

MR. STEIN: Against women.

QUESTION: And you don't have to prove that under the Title VII case?

MR. STEIN: I don't think I have to prove that under Title VII--

QUESTION: Which is the easier of the two?

MR. STEIN: The Title VII case is the easier of the two.

QUESTION: Then why are you pursuing this one?

MR. STEIN: Because I think that this is a particularly aggravated situation and I think under the circumstances the individual should be required to be held individually responsible, if they can be. And I think the salutary effect--

QUESTION: In other words, the difference is you cannot hold the individuals responsible under Title VII?

MR. STEIN: I may or may not be able to. I have never had the opportunity actually to develop the facts.

QUESTION: Assume you prove everything you have alleged--

MR. STEIN: Then I would collect under Title VII, but I would not necessarily collect to the same extent.

QUESTION: Do you think the remedy is greater under 1985(3)? What under the statute gives you a greater remedy? I'm not sure I--

MR. STEIN: Under 1985(3) I may, and, again without saying that I do because this Court has never so indicated, and I would really like to get to the fact development to determine and to continue on with the case, but I may have a right to collect compensatory damages in the nature of additional costs for searching for another job. I may have the right to collect for punitive damages if I can find an applicable--

QUESTION: In a word, you think the 1985(3) provides greater remedy than Title VII?

MR. STEIN: I think the 1985(3) may provide greater remedies and, at this point, these questions have not been decided by this Court and I think that's somewhere down the road. I would like to get to that point.

QUESTION: Mr. Stein, am I wrong in thinking that the right you say is created by Title VII is the substantive right which you are seeking to enforce under 1985?

MR. STEIN: Yes, sir, I would say that that's the case in this particular instance, without necessarily conceding to the Court because I haven't fully gone into it without necessarily conceding that 1985(3) didn't create any substantive rights, but I would say that we are asserting under 1985(3) the statute passed by Congress which created the equality of rights for women and others.

QUESTION: Certainly that's what the Third Circuit

said?

MR. STEIN: Yes. I felt it didn't have to go any farther than it did, and it didn't. An d I think the Third Circuit simply felt that Congress was well within its Constitutional powers to do that, if that's what it wanted to do.

QUESTION: Well, no one is challenging the Title VII remedy here. The question is whether the Title VII right is one that can be enforced not only under the Title VII procedures set up in '64 but it is also subject to the procedures provided in 1985(3).

MR. STEIN: Correct.

There are certain matters which I did not think were in serious dispute. I think that women are among persons who are protected under 1985(3) and I think it's also clear that discrimination against women as a class is invidious discrimination. I think that 1985(3), the persons who suffer the discriminatory animus and the person who suffers the damage do not necessarily have to be the same person, and I find nothing in 1985(3) which would prohibit a man or any other person, a man from asserting a right or asserting damage resulting from the invidious discrimination when he has, in fact, suffered that damage.

And I would also like to point out to the Court that this is not a case in which 1985(3) was used to circumvent

Title VII procedures. Mr. Novotny immediately went to the EEOC and filed his claim with the EEOC and permitted the EEOC procedures to run long beyond the point at which he would have a right to have his right to sue issued to him if he had requested it, regardless of what else happened.

The argument that Title VII will be undermined by 1985(3) is an argument which I think has been made many times to this Court. And I don't think there is any reason to believe that the use of Title VII will undermine the provisions -- I mean the use of 1985(3) will undermine the provisions of Title VII in any way. There aremajor benefits--

QUESTION: Do you agree then that your client could not go directly to court as soon as the claimed retaliation took place under 1985(3) but would first have to go to the EEOC?

MR. STEIN: No, I do not, but I believe that he could go to court if he wanted to under 1985(3). I do not believe that very many people will.

QUESTION: But those who want could circumvent?

MR. STEIN: I think that those who want to could, and those who want to file 1981 actions in a race case could. And that particular availability has not seemed to bother this Court in those kinds of cases. The Court has faced that question exactly. And I just don't think that very many will do so. And the 1985(3) action is a rather narrow action when

you come right down to it. We are not talking about floods of litigation which will envelope this Court. This is not a situation in which the EEOC will be put out of business. Despite the existence of 1981 and other remedies, the Petitioners in their reply brief which they recently filed, indicates that nevertheless almost 6,000 EEOC cases were, in fact, filed with the EEOC.

QUESTION: The right that you are asserting in this case, at leastthe Third Circuit felt was a Title VII right. And if you were only suing under Title VII you would have to wait for your right to sue letter, wouldn't you?

MR. STEIN: I would have to wait 180 days for my right to sue letter, at which point I could request--

QUESTION: But you suggest that in order to enforce your Title VII right you don't need to wait at all if you just use 1985(3)?

MR. STEIN: No, I am asserting--

QUESTION: That's what you have just indicated. You didn't have to wait.

MR. STEIN: I am indicating that I did not have to wait to file the 1985(3) action because I think the 1985(3) cause of action has independent interests of its own.

QUESTION: I know, but your 1985(3) suit in this case I thought you conceded was to enforce your Title VII right; the substantive right that you are using 1985(3) to enforce

is your Title VII.

MR. STEIN: No, not stated exactly that way. The 1985(3) case arises because of a violation of Title VII.

QUESTION: There was a conspiracy to violate Title VII, and your client was injured thereby?

MR. STEIN: That's correct.

QUESTION: And that in and of itself is a cause of action.

MR. STEIN: It is not necessarily a Title VII cause of action; it is a cause of action all by itself and I do not necessarily have to wait because there has been a violation of a Federal statute. I would perhaps, as a matter of proof, have to show that violation in my case.

QUESTION: Mr. Connors, you have covered the signals there with your hand. You have your first signal.

QUESTION: The Title VII right that you assert, is it the same right that in the 1985(3) case as it would be in a Title VII case? The thing I am trying to figure out is is there a difference in the intent requirement in the 1985(3) case and, if there is, does that indicate there is a difference in the substantive rule you seek to enforce?

MR. STEIN: I do not believe that I have to show the violation of Title VII to recover under 1985(3). I am not sure that I would have to show that the Title VII violation that occurred and against which my client spoke out was an

intentional violation.

QUESTION: But you have to prove a conspiracy though. That has got some mental element in it, hasn't it?

MR. STEIN: Yes, the conspiracy would be to -- the conspiracy would be against him.

QUESTION: To violate Title VII. To deprive him of a Title VII right.

MR. STEIN: No, not necessarily. The conspiracy would have to be to deprive -- the conspiracy would have to be to deprive others of rights which they have under statutes.

QUESTION: Title VII.

MR. STEIN: Title VII rights. They have to intend to deprive him of Title VII rights.

QUESTION: But I still don't think you have answered my question. Let me be sure to try and get it out as clearly as I can. Supposing the directors all agreed that their experience is that women are not as effective workers as men, and maybe they're wrong in their stereotype views, but they just think women shouldn't be paid as much, so they pay them 10 percent less, but they do it in good faith because they think they are not good employees; is that a violation of Title VII?

MR. STEIN: Yes.

QUESTION: Is it a violation of 1985(3)?

MR. STEIN: No, but he would not necessarily be--

QUESTION: Why not?

MR. STEIN: He would not necessarily be suing on that per se. If he came in and then spoke out against that and advised them that they were then doing that and they, knowing it--

QUESTION: They think this is in the interest of the company and it will save us money, that violates 1985--Title VII--

MR. STEIN: Yes.

QUESTION: But it does not violate 1985(3)?

MR. STEIN: It may not--

QUESTION: So you are relying on a different substantive right then?

MR. STEIN: No, because--

QUESTION: It's an additional ingredient of the violation, if I understand you correctly in 1985(3).

MR. STEIN: But there may be a different purpose in their terminating his employment.

QUESTION: I'm just asking do you not have to prove something additional to establish a violation of 1985(3), and if you say yes, what's the source of that right? It must be in the statute itself.

MR. STEIN: Well, it may be and I don't necessarily--

QUESTION: You are taking the position that 1985(3) is not purely a remedial statute.

MR. STEIN: It may not be purely a remedial statute,

and I haven't conceded that it is purely a remedial statute, but--

QUESTION: Must you not be arguing that it is more than a remedial statute?

MR. STEIN: Well, under the facts of this case, I am not sure that I do, because I have a circumstance in this particular case where I can prove that the discrimination in this case was intentional -- that the discrimination against women was intentional and knowing.

QUESTION: So under the facts in this case -- they did it because they didn't like women?

MR. STEIN: Yes.

QUESTION: Wasn't it perfectly legal before the title -- before this statute was passed?

MR. STEIN: Well, yes.

QUESTION: You couldn't have brought it before Title VII, could you? You couldn't have used 1985 before Title VII?

MR. STEIN: I would indicate for purposes of this argument that that may be true, I may not have.

QUESTION: What would you rely on?

MR. STEIN: I would have brought this--

QUESTION: You'd say they couldn't conspire to deny me what?

MR. STEIN: Well--

QUESTION: What would you say?

What could you say -- the conspiracy was to deny you of what right?

MR. STEIN: The conspiracy would be to deny women rights which they may have had, and this would get into a possible argument which I do not necessarily want to press before this Court of the extent of the Thirteenth Amendment and the possibility of the creation of a specific right to employment on the part of everybody that is freedom from discrimination in employment on the part of any person who--

QUESTION: Well, certainly, 1985 didn't mean that?

MR. STEIN: No. Well, I don't know what 1985 meant in that regard, and I am not necessarily going to argue--

QUESTION: Because you want to get through all four cases--

QUESTION: Mr. Stein, as I read your comp laint all you have alleged is they treated the women differently than they did the men. You don't allege that they didn't like women.

MR. STEIN: Well, I don't necessarily say that they didn't like women, but what I think I do allege is that they knowingly discriminated.

QUESTION: That's the first case that I gave you.

QUESTION: Deliberately because they thought they weren't as good, and it turns out they're wrong.

I don't think you have alleged an element of intent

other than an intent to treat them differently.

MR. STEIN: Well, as I think I responded to -- I responded to the Court's question at that time that that's not the case that I was necessarily pleading in the complaint.

QUESTION: That's right.

QUESTION: You're invading his time, Mr. Connors. [sic]

MR. STEIN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

AMICUS CURIAE

MR. WALLACE: Mr. Chief Justice and may it please the Court: It is the position of the United States and the Equal Employment Opportunity Commission in this Court that eight years ago this Court, after a careful review of the legislative history of what is now 1985(c) in the latest edition of Title 42, restored that statute to its proper role in civil rights enforcement, and that the Court of Appeals in this case properly extended the principles of the Griffin decision in a manner that is compatible with Title VII.

As we understand the basic principle of Griffin v. Breckenridge, it's that 1985(c) serves as a remedy for aggravated cases of the violation of other Federal rights, in which a number of individuals sharing a class-based discriminatory animus join in a scheme to deprive a person or persons of their rights under Federal law. And, therefore,

deny them equal protection of the Federal law -- equal rights and privileges under the laws, in the words of the statute. And that is the kind of claim that the Court of Appeals construed the complaint here that was raised in this case, and no question has been put to this Court about the Court of Appeals' construction of the complaint, nor has any question been raised about what the Court of Appeals has decided under Title VII in the case thus far. Although we noted on page 27 of our brief, in footnote 16 that the Petitioners have reserved the possibility of asserting a defense for the individual directors under Title VII based upon the fact they were not named in the original Title VII charge individually.

We have stated our view that that would not be a valid defense.

QUESTION: Is it also arguable that they are not employers within the meaning--

MR. WALLACE: Well, the statutory definition of employer in Title VII includes agent of the employer. So that anyplace the word "employer" or the statutory definition of "union" is the same in Title VII. So anyplace there is a liability of the employer or the union there is a liability of the agent.

QUESTION: Since you are not in this, Mr. Wallace, I presume you are not entitled to enlarge or subtract issues in the case.

MR. WALLACE: I assume so, Mr. Justice. And we are not attempting to. I was just mentioning the relationship between the Title VII claim which has not been brought here, but where a defense still remains to be asserted in the case. The question had been raised about why did the Petitioners bring only the 1985 claim here and this is one factor that was not mentioned in previous discussions.

The Court of Appeals had to reach some issues that this Court in Griffin did not find it necessary to reach in order to decide the case. And a number of those have not been presented in this Court. There is no claim made in this Court that the Court of Appeals erred in construing 1985(c) as extending to class-based deprivation other than racial deprivations. The Court of Appeals dealt with that issue correctly, in our view, but the question, as we see it, is not before the Court. Although what the case does present to the Court is a question whether the kind of supplemental remedy that Section 1981 provides under this Court's unanimous decision in Johnson v. Railway Express on this point, that kind of supplemental remedy in racial cases under Title VII will also exist in sex discrimination cases under Title VII. That's one way of looking at the question that is presented here because 1981 addresses only racial discrimination, and the other classes protected by Title VII have to look to 1985(c) as--

QUESTION: Which they couldn't before Title VII.

MR. WALLACE: But, of course, Title VII is available for racial cases as well as the other. The only supplemental remedy comparable to 1981 for the other classes protected by Title VII is 1985(c), and that is the significance of the case, whether the supplemental remedy will be limited to racial cases, looking at the case as an employment discrimination case.

QUESTION: What kind of a class-based discrimination must be alleged, do you think, Mr. Wallace? In this case, it's against women?

MR. WALLACE: In this case it's against women and that resulted in some injury to this employee. He became a person injured in the retaliation.

QUESTION: Respecting my brother Steven's question, do you have to allege something besides just treating women as a class differently? You must say they have the purpose of treating them differently?

MR. WALLACE: As intentionally treating them differently. Yet, as we see 1985(c), it involves additional elements to a Title VII violation in the sense that it's a kind of aggravated kind of Title VII violation. It's not that 1985(c) is a separate substantive right against discrimination. It's a remedy for aggrevated violations of rights defined elsewhere.

QUESTION: Aggravated in the sense--

MR. WALLACE: There has to be a conspiracy, and the conspiracy must involve a shared animus, a shared class-based animus.

QUESTION: What do you mean by "animus"? Do you mean to treat them differently?

QUESTION: For example, take the Manhard Case, which I am sure you're familiar with, would the action of the director there to adopt different pay contributions for women and men, would that violate 1985?

MR. WALLACE: It doesn't mean anything other than to treat them differently in the sense that the focus is on class.

QUESTION: If you have a payscale and the women get 10 percent less than men, even though you think they are 10 percent less efficient, and it proved out later you were wrong, you would violate 1985(3); is that your position?

MR. WALLACE: That's right. But Title VII under this Court's decision in Griggs extends to employment criteria where the focus is not on the protected class. Griggs involved a high school diploma requirement for someone hired to shovel coal at the Duke Power Company, as well as tests that were given. And those had a disparate effect--

QUESTION: You say that requiring a high school diploma for shovelling coal would violate 1985(3)?

MR. WALLACE: There would have to be a showing that there was something more than a desire to encourage people not to drop out of high school or, you know, hope that people hired at the bottom would have the ability to ride up through the company, something that did focus on animus toward the protected class.

QUESTION: Just unequal impact would not be enough?

MR. WALLACE: Unequal impact would not be enough under 1985(c) but, as we understand, it is enough under Title VII.

QUESTION: On animus, a few years ago when this Court said women were entitled to sit on the jury, the Court was guilty of animus? I think the word is a very carelessly used word.

MR. WALLACE: Well, perhaps it is.

QUESTION: Do I understand you meaning, you don't have to have what you and I think of animus--

MR. WALLACE: Well, it doesn't have to be hostility.

QUESTION: Right. Right.

MR. WALLACE: But there has to be a shared purpose to deprive members of one of the protected classes of their Federal right, although--

QUESTION: Or putting it more simply, a shared purpose to treat them differently from the members not in the class. That's the whole thing.

MR. WALLACE: That's simply put, and we don't disagree with that. And that, we think, is the proper office of 1985(3). The legislative history of Title VII, which this Court has reviewed in detail in recent cases, it is quite specific that the comparable supplemental remedy under 1981 was to be preserved and was considered by those who enacted Title VII to be compatable with the exhaustion requirements and the administrative procedure that was set up under Title VII. It would be difficult to find a Federal statute with more specific history that the remedies created along with the substantive rights in Title VII were not intended to be exclusive, but were intended to permit a supplemental remedy that is comparable in every way to the remedy being asserted here under 1985(c). It's difficult--

QUESTION: 1981--

QUESTION: --don't depend in any way on Title VII. The right claimed here does depend on that.

MR. WALLACE: There is a difference in theory of the remedy, that is correct, Mr. Justice Rehnquist. But, from the standpoint of the legislative intent of the sponsors of Title VII, it is apparent that they did not think it would be inappropriate to have a remedy that was in every way comparable still available for persons protected against racial discrimination by Title VII. And there's no reason to think their view would be different if they had focused

on the question about the other classes protected by Title VII. So it's a matter of statutory construction of Title VII there is no reason to think that a bar to alternative remedies was intended.

QUESTION: But is there any reason to think they intended that Title VII remedies were to be enforced in any other way than that provided in Title VII?

MR. WALLACE: They certainly did. They intended that not the Title VII remedies would be enforced but alternative remedies would still be available and none would be taken away. So that if our construction of 1985(c) is correct, it extends to aggravated instances of class-based deprivations of rights prescribed by other Federal laws or the Constitution, then Congress indicated in Title VII no desire to take away that method of asserting the right in the Federal courts.

QUESTION: What is the aggravation in this case?, under the bill of complaint, beyond preferring to employ men to women? Is that aggravation per se?

MR. WALLACE: Well, it is the shared purpose, the conscious conspiracy in the sense of a shared purpose to treat women differently, even though Federal law says they should not be treated differently. It is not more complex than that, Mr. Justice.

QUESTION: Well, it's certainly a pattern in the business life of this country and that's carried over into the

Government in this country and right into this Court. Most of the secretaries of the Justices and the presidents of corporations and Congressmen are women. Now, would that be the kind of shared purpose, in some way, are all of these people disfavoring of men because we have found, or at least we think we have found that women are more dextrous, they do a lot of things better than men do? I think for years and years with two or three exceptions over this century all of the secretaries of Justices in this Court have been women.

MR. WALLACE: Well, perhaps a few men have been turned away. I don't know that male applicants have not received fair consideration. Certainly, under Title VII--

QUESTION: They have been frightened away by the tradition.

MR. WALLACE: Women who aspire to this kind of employment have the right to be considered on their merit, even if all the other secretaries are women. It relates to a previous argument in this term.

MR. CHIEF JUSTICE BURGER: Well, that terminates this. Thank you, gentlemen, the case is submitted.

(Whereupon, at 11:45 o'clock a.m. the case in the above-entitled matter was submitted.)