OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1626 & 85-2010

TITLE CHARLES GOODMAN, ET AL., Petitioners V. LUKENS STEEL COMPANY, ET and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., Petitioners V. CHARLES GOODMAN, ET AL.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES GOODMAN, ET AL.,
Petitioners
v. No. 85-1526
LUKENS STEEL COMPANY, ET AL.;
and
UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, ET AL.,
Petitioners,
v. No. 85-2010
CHARLES GOODMAN, ET AL.

Washington, D.C.

Wednesday, April 1, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:52 a.m.

APPEARANCES:

ROBERT M. WEINBERG, ESQ., Washington, D.C.; on behalf of the Petitioners in No. 85-2010 and respondent Union in No. 85-1626.

WILLIAM H. EWING, ESQ., Philadelphia, Pennsylvania; on behalf of respondents Goodman, et al., in No. 85-2010 and petitioners No. 85-1626.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next on two consolidated cases, No. 85-1626, Goodman against Lukens Steel, and No. 85-2010, United Steelworkers against Goodman.

Mr. Weinberg, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT M. WEINBERG, ESQ.,
ON BEHALF OF PETITIONERS IN NO. 85-2010 AND
RESPONDENT UNION IN NO. 85-1626

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

This is a class action employment discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964, and 42 USC Section 1981.

The defendants in the case were the employer, Lukens Steel Company, and United Steelworkers of America and two of its locals.

In the courts below, plaintiffs prevailed on some but not all of their claims against the employer, and on one of three claims against the union.

The unions and the plaintiffs both petitioned this Court. Both petitions were granted. And they've been consolidated for this argument.

The question presented by the union's petition

is whether either Title VII or Section 1981 imposes on unions an affirmative duty to combat employer discrimination.

The question presented by the plaintiffs' petition is, what statute of limitations should apply to the 1981 claims -- to the Section 1981 claims in this case.

I plan to devote my opening argument to the issue raised in the union's petition, the affirmative duty issue. My presentation will be in two parts.

I will discuss our legal position, which is quite straightforward. Basically, our position is that the only duty that Title VII imposes on unions with respect to employer discrimination is the duty not to cause or attempt to cause that discrimination.

That's the duty stated in Section 703(c)(3) of Title VII. That provision leaves no room for any affirmative duty on the part of the unions to combat employer discrimination.

Likewise as to Section 1981, this Court has already held in General Building Contractors, that the only duty that Section 1981 imposes is the duty not to engage in intention discrimination.

Section 1981 does not impose a duty on any party to combat discrimination by another party.

To interpret either of these statutes to place the affirmative duty on unions to combat employer discrimination would be inconsistent with the role of unions as set forth under our system of labor relations set up by the National Labor Relations Act.

Before I elaborate on these points, I want to address another matter. Plaintiffs who pleaded and tried this case on the theory of an affirmative duty to combat employer discrimination; who argued the case to the Court of Appeals on that theory, now say that this case doesn't raise the issue.

Plaintiffs are wrong about that, but I think it's worth taking a few minutes to demonstrate why they're wrong, because in the process the legal issues here will be focussed.

Plaintiffs' complaint asserted three claims against the unions. Two of the claims were claims that the unions themselves had discriminated. One claim was that the unions had adopted and maintained a discriminatory seniority system; the other was that the unions discriminated in processing grievances.

The district court found for the union on both of those claims.

The third claim that was in Plaintiffs' complaint was based on the affirmative duty theory. In

the words of the complaint, the unions, quote, failed to act affirmatively to cause the employer to refrain from discriminating against black employees because of their race and color.

It was on this theory that the district court found the unions liable. And in so finding, the district court did not find that the unions failed generally to oppose employer discrimination. The findings of the district court and the record are clear that the unions made many such efforts, and many were successful.

The court below based the finding of liability on this case on a narrower failure on the unions' part, and that is the repeated failure to assert racial discrimination as a ground for grievances.

It was that failure that was the breach of the affirmative duty found by the district court.

In this regard, it's very significant that the court did not find that the unions' failure was motivated by racial -- was racially motivated.

It did not find that the unions were giving inferior treatment to black employees as opposed to white employees.

And it did not find that the unions' failure to raise race discrimination as a ground for grievances

was a racial classification.

QUESTION: Mr. Weinberg, did the Third Circuit deal with the theory of liability as one of a breach of a duty of fair representation --

MR. WEINBERG: Your Honor --

QUESTION: -- rather than a direct violation of Title VII or Section 1981?

MR. WEINBERG: The Third Circuit, Your Honor, had a sentence which said that the unions' conduct here violated the duty of fair representation.

This case was not -- that was not one of the bases for the complaint in this case, which was brought only on Title VII and on Section 1981, so it's not clear why the district court found that.

I think --

QUESTION: Well, do we have to deal with that as a theory, I suppose?

MR. WEINBERG: Your Honor, you don't have to deal with it as a theory. But I think it's useful -- because it's not raised in the case -- but I think it is useful to understand. It's part of the general context for this case, why it is that what the union did is not a breach of the duty of fair representation.

The duty of fair representation does not tell unions what their priority should be or what their

tactics should be.

It doesn't dictate any substantive position. What te duty of fair representation says is, whatever you do with respect to your members, because you have this exclusive authority to act on their behalf, you have to do it without improper motivation.

You cannot be discriminatory. You cannot be arbitrary. And you cannot act in bad faith.

So that if unions are taking actions which aren't discriminatory, arbitrary, or in bad faith, but are in fact based on some other ground, the duty of fair representation does not come into play.

And so --

QUESTION: Did the district court make a finding as to why the union had not raised claims of racial discrimination on grievances?

MR. WEINBERG: Your Honor, I think it did. But I think you've got to -- and I think now is as good a time as any to do that -- I think you've got to focus on the various practices.

Because it in effect made findings with respect to each of the practices it found the unions liable for.

And I think it's very helpful in looking at those findings, because it not only shows that this case

is in fact an affirmative duty case, but it shows that what the affirmative duty reduces to in practice is judicial second guessing of unions tactics and union priorities.

I think the basic finding that the union -- that the court, district court, made was that the union, when there was another ground available for a grievance, would base the grievance on that other ground, and not on the ground of race discrimination.

But the court recognized that the unions' reluctance to do that -- and it was a reluctance, because the unions did, in a number of instances, make claims of race discrimination and grievances -- but the court recognized that the unions' reluctance was for tactical reasons, not for racial reasons.

For example, if a black employee were laid off, and a junior white was kept on the same job, the black employee would have a very solid seniority grievance. The layoff is out of order, and he was entitled to keep the job on a seniority basis.

To add race discrimination, a claim in that instance, would be of no help to the grievant. If he's senior, he'll win; if he's not senior, he'll lose.

But in addition, and the court found that the union -- this was the union's perception. There were --

there may be disadvantages to the grievant to raise race discrimination in a claim like that.

It's difficult to prove race discrimination as this case illustrates. Alleging race discrimination when you've already got a solid objective ground like seniority may well tend to complicate and delay resolution of the grievance.

And in addition, as the court found, it was the union perception that raising race discrimination made it more difficult to settle individual claims with the company.

These considerations were testified to by black and white grievance men, including a number of plaintiffs' witnesses -- excuse me -- and the court accepted these reasons as the reasons for the unions' reluctance.

Indeed, the court found that by pursuing this approach, the unions had been successful in combatting employer discrimination in a number of areas.

I won't quote it here, but at page 93A of the -- of the petition appendix in 85-2010, the court goes into great detail about how pressing grievances on objective contract ground in fact successfully combatted employer discrimination in a number of areas where plaintiffs had brought claims.

QUESTION: Well, Mr. Weinberg, would you contest that the union would be guilty of racial discrimination if it just absolutely refused to process any grievances based on racial grounds, and they refused to process them because they just didn't want to process racial grievances?

MR. WEINBERG: Well, adding the second factor --

QUESTION: Yes.

MR. WEINBERG: -- I would agree, Your Honor, that if -- well, if a union decides not to process race discrimination claims for racial reasons, for racial animus, then that is clearly a grievance.

QUESTION: Well, what if the union -- could it be inferred, could racial animus be inferred from the fact that they just never processed a racial grievance; they just don't do it?

MR. WEINBERG: Your Honor, I think -- I don't think it could be inferred from that fact alone. Certainly in a case where the reasons are apparent why they didn't do it, any such inference would in any event be overcome.

QUESTION: Well, in any event, I think from your recitation of the facts that that claim was found in your favor by the district court.

MR. WEINBERG: The district court found that the union had not discriminated in processing grievances; that blacks and whites were treated alike.

And there is no finding anywhere that blacks got inferior treatment.

QUESTION: Was there no -- was there -- there was no finding that the union refused to process a grievance because it was a racial grievance?

MR. WEINBERG: No, Your Honor. There was a finding that in a number -- as the court said, in repeated instances, when a black grievant came to the union with a complaint, a seniority complaint, an overtime complaint, a shift differential complaint, and he said to the union, I think that the reason I didn't get what I should have gotten is because of race discrimination, there is a finding by the district court that the unions in that case, when they had this other ground, were reluctant to allege race discrimination.

QUESTION: Well, what about when there wasn't another ground?

MR. WEINBERG: Your Honor, there is -- there is -- there are a couple of instances where there was not another ground, and I think you have to deal with those separately.

One of those was probationary --

QUESTION: Well, did it ever file a racial grievance where there wasn't any other ground?

MR. WEINBERG: Yes, Your Honor.

QUESTION: And that was found -- so found by the district court?

MR. WEINBERG: I don't think the court found one way or the other, but there are documents in the records which are grievances -- which are racial grievances. And so that the record --

QUESTION: Well, did the Court of Appeals affirm on the basis that -- that the district court used?

MR. WEINBERG: Your Honor, I believe that the Court of Appeals did affirm on the basis that the district court used. The Court of Appeals through in some -- some other references.

But I think its analysis was the same. The Court of Appeals said that the gravamen of the wrong here was that the union had failed to assert race discrimination as a basis for grievances.

And the Court of Appeals, as did the district court, said that there was more than just a failure, that it was an intentional failure, because the unions knew that there was employer discrimination, and failed -- and failed to raise discrimination in grievances.

The Court of Appeals took that finding and put

some labels on it that the district court did not put on it, but I think the issue remains the same.

The court, for example, as Justice O'Connor stated, called it a violation of the duty of fair representation. The court said it was a violation of Section 703(c)(1).

But I think those are just labels. I don't think the court was seeing the case differently or characterizing the case differently than the district court had.

QUESTION: What if the district court here had found that the union failed to present race discrimination claims when it could have, that it was not racially -- that it was not discriminating between black people and white people, that its reason for failing to do that was simply its lack of expertise. We're used to seniority claims; we're not used to race discrimination claims.

Would that state a violation of the union's duty as you see it?

MR. WEINBERG: I think it certainly would not, Your Honor. In fact, one of the -- one of the claims in this case borders on that -- on that rationale. The court found that the unions did object to the company's tests of all kinds.

But the court faulted the union because the union's grievances against the company's tests were not based on race discrimination, they were based on an independent ground in the contract, and that is, the job relatedness ground.

Under the union's contract, unlike Title VII, if a test is not job related, then it's invalid. The union had gone on that ground. The director of arbitration for the union, the international union, testified to why the union had done that.

It was already -- those grievances were already were so incredibly complicated that they were processed out of the international union arbitration department, and not out of the local union by local union people.

Proving job relatedness required all kinds of expert testimony, and technical knowledge and expertise.

To add the second ground, and that is, which would not be necessary if the union prevailed on the job relatedness ground, to add the second ground of race discrimination would add a whole other layer of complication.

QUESTION: That might have -- from what you say, that might have been an easier ground to prove that the very complicated job relatedness ground.

MR. WEINBERG: Your Honor, the testimony was that it was not. But there are a couple of other factors.

One, it was absolutely clear that if it was not job related, the test would be struck down. It was not so clear if the -- if the test was -- had a disparate impact but was job related what would occur.

The union would argue that in that event, the test would be struck down, but it's not clear that that would be the case.

But second of all, one of the union's objectives was to strike the test down for everybody. If the union won on the job relatedness test, then the test was struck down for everyone.

It was not clear what would happen if the union were successful in striking the test down just on the racial discrimination grounds.

QUESTION: Mr. Weinberg, what if the district court had made a finding relative to the Title VII claim that the unions method and practices in the processing of employee grievances had a disparate impact on blacks?

MR. WEINBERG: Your Honor, there was no such finding in this case.

QUESTION: I asked, what if the trial court had made that finding?

MR. WEINBERG: Your Honor, there would be a threshold question, and that is that -- I guess there'd be two threshold questions.

The first is that 703(c)(2), which would be the disparate impact section, we believe is addressed to situations where you have a union that controls access to jobs, a hiring hall, or some other union that actually controls job opportunities; and that that disparate impact section does not apply to the kinds of union representation that goes on in this kind of an industrial union setting.

QUESTION: That's not entirely clear to me. Is there any substantial body of authority to support you?

MR. WEINBERG: There is not. I don't think the issue is resolved one way or the other.

The second point is --

QUESTION: The district court here didn't make a finding one way or the other on that?

MR. WEINBERG: No, there was no claim. That claim --

QUESTION: Well, there was a Title VII claim.

MR. WEINBERG: No, there's a Title VII claim, but there was no claim that the unions had -- had violated Title VII by having a policy which had a

disparate impact.

There was no finding, and there was no claim.

I want to add, because I think this is very important, that where the disparate impact really results from the -- from employer discrimination, where you have a policy that the union is applying, and the -- and it has an impact that's negative on blacks, because in fact employers are discriminating, and it doesn't successfully combat that, then I think there's no room for the disparate impact theory, even if I was wrong about my first point.

And that is because I don't think the disparate impact was meant to be a basis for holding one party liable for another party's intentional discrimination.

The party to sue for that discrimination would be the party committing it. And that is confirmed in the case of unions by Section 703(c)(3). Section 703(c)(3) states the exclusive ground for holding a union liable for employer discrimination.

It says that -- the first two subsections of 703(c) talk about discriminatory conduct of a union within itself.

Section 703(c)(3) is addressed to union responsibility for employer conduct. And it says that a

union can be held liable for employer discrimination if the union causes or attempts to cause that discrimination.

And I think that any interpretation that would say that a union which somehow or another has a policy which doesn't do a good enough job of combatting employer discrimination is a disparate impact violation I think would be inconsistent with that section.

QUESTION: No, you would say that -- that even if in fact it were proven, as you assert it was not proven here except with respect to probationers, perhaps, that the union categorically would not process racial discrimination grievances, and would not do so because -- well, never mind -- just categorically would not do so.

And even if it were proven that the effect of that was inordinately to disfavor blacks, that would not be a violation?

MR. WEINBERG: Your Honor --

QUESTION: That's what you're saying.3

MR. WEINBERG: -- I am saying that, but I want to rephrase that a little bit.

QUESTION: Why don't you start saying yes or no, and then explain it.

MR. WEINBERG: Okay. The answer, that would

not be a violation. That would not be a violation.

But I want to make it clear what we're talking about. It would disfavor blacks in the sense that unions would not be doing -- taking the actions which would be -- which would be most favorable to their unique interests.

It is different from giving some kind of inferior treatment to blacks, or treating them in a discriminatory manner.

I want to get to the probationary employees.

QUESTION: Yes, I was going to ask you whether you think the probationers --

MR. WEINBERG: The probationary employees is a different situation entirely. There the court found -- court found that the employer was discriminating against blacks in the discharge of a probationary employee -- employees.

It found that the union did not challenge those discharges. But it also found why the union didn't challenge those discharges.

And the reason that the court found was not a discriminatory one. The court found that the union, having this tremendous backload of grievances that were unresolved, didn't process any kind of claim for probationary employees for any reason; that includes the

whole gamut of contract claims that can be raised for a probationary employee, and would affect whites as well as blacks.

The only rights that are limited under the contract for probationary employees are the rights upon discharge, which are limited since 1974 to discrimination based --

QUESTION: Well, does that -- could that amount to a disparate impact finding, in effect --

MR. WEINBERG: Your Honor --

QUESTION: -- that the union didn't process claims, for whatever reasons, for probationary employees, and that failure had this disparate impact because so many of the probationers being discharged or let go were black?

MR. WEINBERG: It is clear that that was not -- in order -- in order to know where there was a disparate impact on blacks because of the union's policy, you would have had to have proved a lot of things that were not proved in the trial court.

You would have to prove what -- assuming for the moment that the disparate impact theory would apply -- you would have to know what were the grievances that would have been processed; who were the -- what were the claims; who had the claims; and did in fact that policy

have a disparate impact on blacks.

Because probationary discharges were just one of hundreds of possible claims that probationary employees could have.

There was no evidence of that. And there was no evidence on another point, and that is, that race discrimination claims, as we've already alluded to, are different from other kinds of claims under the contract. And you're comparing apples and oranges when you talk about a race discrimination claim and a wage claim or a seniority claim.

Proving, in this case, to prove their probationary discharge claim, the plaintiffs brought in a mass of statistical and anecdotal evidence.

The unions, if they had intended -- if they were going to process a similar kind of claim would have had to do the same kind of thing.

So you're not -- all those things would complicate a disparate impact analysis. But plaintiffs made no effort to prove that, and neither court based its findings on that, and I think the issue is just not here.

QUESTION: We have -- speaking of what the courts based their finding on, the Court of Appeals found that there was no proper representative for the

probationers anyway. So do we still have to worry about the probationers?

MR. WEINBERG: No, no, for the probationers that's not correct. The court found that there was no proper representative for the initial assignment cases.

QUESTION: Not for all?

MR. WEINBERG: Well, you know, I say that. And I must confess, Your Honor, I don't recall the court saying there was no proper representative for probationary employees. But it would almost follow, one from the other, because the reason the court found that there was no proper representative for the initial assignment claim is that all of the named plaintiffs had been working at the plant long before the statute of limitations in this period began.

On that rationale, they would be the same. But I can't say at this moment that I actually recall language in the court's opinion saying that.

In fact, a note was just passed to me that said, the Court of Appeals, notwithstanding the lucid argument I just made, said that probationers were represented.

QUESTION: Were?

MR. WEINBERG: Were, yes.

QUESTION: Were what?

MR. WEINBERG: Represented.

As I've already --

QUESTION: It wasn't the your opponent that handed you that note, was it?

MR. WEINBERG: It was not. It was not.

If the Court please, I'd like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Weinberg.

We'll hear now from you, Mr. Ewing.

ORAL ARGUMENT OF WILLIAM H. EWING, ESQ.,
ON BEHALF OF RESPONDENTS GOODMAN, ET AL., IN
NO. 85-2010 AND PETITIONERS IN NO. 85-1626

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

Let me -- I would first like to address the issues raised by the union's cert petition on their liability, and then go on to the issues raised by our cert petition on the statute of limitations.

And let me start off just by elaborating a little for Justice Scalia's benefit on the reasoning of the Court of Appeals, because prima facie, it sounds quite puzzling.

The plaintiffs had contended that there was discrimination in discharges, generally. And several of

the named plaintiffs had been discharged by Lukens.

On examining the evidence, the district court found that he couldn't find discrimination generally in discharges, but in discharges with respect to probationary employees, he did find discrimination.

And since the Court of Appeals said that since the issue was presented legitimately by plaintiffs who had the right -- standing to present the issue of discrimination in discharges, that satisfied that standing problem on that subissue of probationary discharges.

Our -- our argument on union liability has three basic points. First, we disagree in the strongest terms with the union's position that the district court did not find discrimination in the handling of grievances.

The district court did find that the unions had discriminated on the ground of race by intentionally showing reluctance to file grievances alleging racial discrimination under the racial discrimination provisions of the collective bargaining agreement; a reluctance which was not shown with respect to the other provisions of the collective bargaining agreement.

QUESTION: Did the district court say that the union decision was motivated by racial animus?

MR. EWING: No. Well, yes, in the sense that the district court went into a considerable dicussion of the intent which was necesary to find a violation of 1981, and including the term "racial animus," and then it said that the unions had -- had intentionally refused to file these grievances.

QUESTION: Well, of course, I take it it wasn't inadvertent on their part. They did intentionally refuse to file them.

But was the reason a racially motivated one?

MR. EWING: Yes, it was, Your Honor.

QUESTION: (Inaudible) racial grievance.

MR. EWING: That's right. And any time -- this Court has held --

QUESTION: Isn't that different -- isn't that different than saying the refusal to process it was based on racial animus?

MR. EWING: Well, this Court has held that anytime a racial classification is drawn, that -- that the necessary intent, the necessary racial animus is found.

QUESTION: No, we've said that when a racial classification of people is drawn. We've never said it to a racial classification of arguments.

MR. EWING: Yes, Your Honor, in the --

QUESTION: I mean, it's one thing to discriminate against -- against a race of people. It's another thing to discriminate against a racial argument, and to say, I don't like to argue on the basis of race discrimination; I have better arguments.

That's not race discrimination. Its racial argument discrimination.

MR. EWING: In Hunter v. Ericson and Washington v. Seattle School District No. 1, this Court held that racial -- classification of racial issues, racial matters, differently from other matters in the same area is a racial classification.

There, as you recall, in the Hunter v. Ericson case, the City of Akron had passed a charter amendment that suspended the fair housing ordinance, and said that in order to adopt a new fair housing ordinance, there would have to be a plebiscite.

And this Court held that even though Akron wasn't required to have a fair housing ordinance, its treating fair housing as an issue differently from other regulation of real estate transactions violated the Fourteenth Amendment, the equal protection clause.

QUESTION: Well, my earlier question to you, Mr. Ewing, was a factual one rather than a legal one.

I was interested in finding out exactly what

sort of intent, if any, the district found the union to have.

MR. EWING: The district court found the union to have the intent to treat violations of the nondiscrimination clause of the collective bargaining agreement differently from other clauses of the collective bargaining agreement.

QUESTION: Yes, I suppose that would be obvious just from the action. Did it go further and say that the reason that it had this policy was because of racial animus?

MR. EWING: Well, it suggests it. In the paragraph that began saying that the situation that is here is far more than one of mere passivity, it went on to suggest that the reason was either that it wanted to avoid antagonizing its white members, or wanted to increase its chance of success in grievances with the employer on other issues.

But it's our position, and I feel very strongly that this Court's decisions uphold it, discrimination is defined as making a difference in treatment.

Intentional discrimination is making an intentional difference in treatment. And if you draw a racial classification, and you treat people differently

on the basis of the racial classification, then that is intentional discrimination under this Court's decisions.

QUESTION: Well, if you consciously, knowingly do something, it's intentional in your view, without regard to the motive? If the union consciously adopts a policy of not processing racial grievances, from whatever motive, that is intentional discrimination?

MR. EWING: Yes, Your Honor, just as in Palmore v. Sadatti, this Court struck down a decision of a Florida court removing a white child from the custody of her mother because the mother had married a black man.

And this Court said, we recognize what the -- the reason the Florida court gave, that there's a social stigma attached to interracial families, but that doesn't justify creating a racial classification.

QUESTION: Yes, but Mr. Ewing, you're giving us constitutional cases in answer to the questions about a statutory issue here.

And is it your position -- I want to be sure -- you've called our attention to the paragraph in the Court of Appeals opinion which refers to a union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and have better luck on other claims or because of the perceived

desire of the white membership is liable under the statute.

And it's your position, I take it, under the statute, it doesn't make a bit of difference what the union's reason for intentionally avoiding asserting discrimination claims was, even if the union could prove that in the long run this was wise union policy and resulted in success on many, many other grievances, you would say that's still a per se violation of the statute?

MR. EWING: That's right, Justice Stevens.

QUESTION: I wanted to be sure I had your view.

Let me also answer with respect to making a constitutional argument on a statutory claim.

This Court has pointed out in Steele v. Louisville & Nashville Railroad, in Emporium Capwell and in other cases, that the situation of a union is similar to that of a governmental entity with respect to its rights and responsibilities to its members regarding equal protection.

And that because the union has the exclusive bargaining right for the members, therefore it has an equal obligation -- I think in Steele it said at least as strong an obligation -- as a governmental entity to treat those members with discrimination.

QUESTION: (Inaudible) cases the two were working together; the brotherhoods were working with the employees to discriminate against Negroes.

MR. EWING: With the employer, yes, Your Honor.

QUESTION: And that's not here?

MR. EWING: Well, the district court found here that both the union and the employer avoided addressing the discrimination claims of the employees.

QUESTION: (Inaudible.) There was open shop --

MR. EWING: That's true. That's true, Your HOnor. But we still have the situation here that they carried out a similar course of conduct which resulted in perpetuating a discriminatory environment where crosses were burned, people wore KKK armbands to work, racially derogatory grafitti appeared throughout the plant.

The -- I think -- back to Justice Stevens' question about whether the motive matters, if a real estate broker has black customers, and in showing them houses, decides to avoid certain white neighborhoods, why, because he's found from experience that if shows black homebuyers houses in those neighborhoods, the houses are suddenly taken off the market, or maybe violence results.

And so he just doesn't show them to the black

homebuyers. He finds them houses in other neighborhoods, integrated neighborhoods, black neighborhoods, maybe other white neighborhoods that are more progressive.

The results for the customers may be as good in terms of they find houses they're satisfied with, but it seems to me there's still been discrimination by the broker.

QUESTION: You may be entirely right, Mr. Ewing. The only point that I had -- well, two points, really. One, for purposes of addressing your argument, we can assume the motive is the first of the two alternatives, improving chance of success on other issues, and it won't weaken your argument in the slightest.

MR. EWING: That's right, Your Honor.

QUESTION: We don't have to assume it was because of the perceived desires of the white majority.

MR. EWING: That's right.

QUESTION: And the second point, though, is that even the example you give comes within different statutory language.

The statutory language you must come within is the "cause or attempt to cause" discrimination; is that not right? At least with respect to the Title VII

requirement. I mean, your Title VII claim is based on the language of the statute --

MR. EWING: No, I was just --

QUESTION: Or you're talking about 1981.

MR. EWING: In the example I gave with the real estate brokers?

QUESTION: Yes.

MR. EWING: NO, I was only looking at the motive question there. o

QUESTION: Right, I understand.k

MR. EWING: Whether the motive was relevant.

QUESTION: It's not relevant there.

MR. EWING: But here there is still discrimination. When they process some claims, they process all their claims. They filed 8,000 -- more than 8,000 grievances. That's a ratio of almost two a day.

QUESTION: Yes, but let me say, assume I agree with you, that's discrimination. Which subsection of 703(c) does that discrimination violate?

MR. EWING: Under (c)(1).

QUESTION: Oh, that's (1), I see.

MR. EWING: That is discrimination. The union may not discriminate. Here, the union discriminated between --

QUESTION: I see, exclude or expel from its

membership, or otherwise to discriminate against its membership.

MR. EWING: That's right.

QUESTION: You say it comes in under "otherwise discriminate"; I see.

MR. EWING: The union treated members complaints of employer discrimination differently from the way it treated other member complaints.

QUESTION: (Inaudible) below a disparate -- disparate treatment argument?

MR. EWING: Primarily a disparate treatment argument. They really overlap. We show that the union treated the claims differently, the claims of discrimination differently from other claims; and that this had a disparate impact also.

Because the district court found that this perpetuated the discriminatory environment.

QUESTION: Well, never mind what they did. Did you seek to make a disparate impact case?

MR. EWING: Not in -- not in statistics, Your Honor, at least as against the union.

So --

QUESTION: So you rely on --

MR. EWING: It's hard --

QUESTION: -- you rely here on a disparate

treatment theory?

MR. EWING: We did not draw that distinction. We put on evidence of --

QUESTION: Well, what are you relying on here to support you? A disparate treatment analysis?

MR. EWING: Primarily on disparate treatment, Your Honor. I think that the government and the unions were wrong when they say we did not prove disparate impact.

Because we did prove --

QUESTION: Well, there was no finding of the district court, was there, of disparate impact?

MR. EWING: Yes, Justice O'Connor, there was, because the district court found --

QUESTION: Can you show me, tell me, where in the record I would find that?

MR. EWING: Yes, Your Honor. On page -- the union petitioner's appendix, page 138A, the district court stated: The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment.

QUESTION: Well, that's --

QUESTION: That's a finding of disparate impact, in your view?

MR. EWING: Yes, Your Honor.

QUESTION: Well, I take it you are -- didn't the Court of Appeals hold that the union has an affirmative duty to combat employer discrimination or not?

MR. EWING: The Court of Appeals said that. But then they went on --

QUESTION: Are you defending that statement?

MR. EWING: We believe that's correct, but that is not necessary to the decision of this case.

QUESTION: Why isn't it?

MR. EWING: Because what the district court found and the Court of Appeals affirmed, both of them said, this is -- what we have here is something very different from mere passivity.

QUESTION: So it's all right with you, if we agree -- if we agree with you, we nevertheless disaffirm what the Court of Appeals said about an affirmative duty on the union?

MR. EWING: Yes, Your Honor. As long as you affirm the Court of Appeals on this issue.

The -- on the -- on the issues of probationary employees and the testing, the unions made a lot of their argument that, well, they grieved testing on the grounds of job relatedness rather than violation of the discrimination clause.

But in fact, until at least a year or more after this case was filed, from the beginning of the limitations period, the union had filed only one grievance over testing on job relatedness ground either; and that was over a whole battery of tests.

So during the years, except for that one grievance when they were manning a new facility, when the employer was manning a new facility, during the years when the Wunderlicht test was in common use by the employer, day-to-day use, the unions did not grieve that, either on job relatedness ground or on discrimination grounds.

Similarly with respect to probationary discharges, the union said, well, we didn't grieve probationary discharges; that's across the board.

But the only ground on which they could have grieved probationary discharges was discrimination, because otherwise the employer had full discretion to discharge employees during the probationary period.

So their failure to grieve probationary discharges is seen as just another aspect of their reluctance and almost total failure to grieve discrimination in any aspect.

QUESTION: Did the evidence show that the only probationary dischargees were black?

MR. EWING: Oh, no, about half of the people discharged during the probationary period were white. It was -- blacks were over 50 percent; whereas they were about a third of those hired, they were more than half of those discharged.

QUESTION: And were any -- any white probationary grievances claims grieved?

MR. EWING: Not that I'm aware of, Your Honor. But the only ground on which they could grieve probationary discharges was discrimination; because otherwise the employer had --

QUESTION: The contract gave the probationers no rights?

MR. EWING: That's right.

QUESTION: Let me just be sure I understand. You say the contract gave the probationers no rights at all? Because I understood your opponent to say there were hundreds of grounds for grievances on behalf of probationers, and this was one of a large universe, and they just didn't enforce any of them.

Which is right?

MR. EWING: The contract gave basically no seniority rights --

QUESTION: But did it give any rights at all?

MR. EWING: -- and no rights with respect to

discharge. Presumably, if a probationary employee worked overtime and wasn't paid overtime, yes, there would have been a violation of the contract that could have been grieved on behalf of the probationary employee.

QUESTION: And is it correct that the district court found the union had a uniform policy of not processing any of those grievances for probationers?

MR. EWING: The district court found that. Now, that was stated both in the testimony and in the district court's findings, in the context of a question about grievances over discharges of probationary employees.

But even aside from that, the union claimed to have -- claimed to give priority to discharges, to grievances over discharges and suspensions. So that if -- when probationary employees were discharged, that was a different kind of situation from whatever other minor grievances probationary employees might have.

And even though they claimed to give priority to -- to grievances over discharge and suspensions, they didn't give any priority, they didn't grieve probationary discharges, which they could have only grieved on account of race.

The union is just wrong when they say that the district court found that there was no discrimination in

the grievance handling process.

What the district court found was that once grievances were filed, and moving up into the second, third step, arbitration and so on, that it could not find that grievances of black employees were treated differently from grievances of white employees.

But then it went on to say, plaintiffs are on firmer ground, however, with respect to their complaint that the unions discriminated by failing to grieve discrimination claims.

QUESTION: You think there's a square finding or facts in the record that indicate that a black person comes to the union and says, I was fired because I'm black or wasn't promoted because I'm black and I want a grievance; and the union says, I understand your claim, and I have no doubt that's why the employer did it, but we're just not going to file a grievance?

MR. EWING: If -- in the case of a discharge --

QUESTION: We don't discriminate. The union says, we don't -- we're not doing it because of race, but we just don't want to make the employer mad. We're just not going to file it.

Now, are there findings like that?

MR. EWING: No, in the case of a discharge, the union would grieve it. But they would not put in,

because of race, by and large.

There were a few cases where they did put it in, but by and large it was admitted they were reluctant.

QUESTION: Well, are there some -- what kind of grievances did they refuse to file altogether which would have been racial grievances?

MR. EWING: Basically, what the district court found was that they were reluctant to file racial discrimination grievances. They avoided it wherever possible.

QUESTION: Well, that may be. Well, did they -- did they actually -- are there some instances where they actually refused to file a grievance --

MR. EWING: Yes, there are, Your Honor.

QUESTION: -- because it was a racial grievance?

MR. EWING: Yes. And -- and more instances --

QUESTION: And did the district court find that?

MR. EWING: Yes, Your Honor.

QUESTION: Had filed none at all?

MR. EWING: He -- he found that their --

QUESTION: Because the only grievance you have is racial, we will not grieve this matter at all?

MR. EWING: I don't know whether -- well, yes

--

QUESTION: That's what I asked yaou.

MR. EWING: -- the district court found that because -- the union's position that it would grieve on other grounds where it could failed to take account of the numerous instances of racial harrassment where there were no other grounds on which to grieve.

QUESTION: Well, so again, did -- are there -- were there findings that -- that the union wouldn't file a grievance at all because it was a racial grievance?

MR. EWING: In a particular case, Your Honor.

QUESTION: Yes. Yes.

MR. EWING: The district court --

QUESTION: That's the only kind there are.

MR. EWING: Well, I wasn't sure whether your question --

QUESTION: Well, are there specific cases where the union refused to file any grievance at all because it was a racial grievance?

MR. EWING: Yes, Your Honor. But the district court didn't specify those cases in its opinion, but they are in the record. Yes, I believe there are.

QUESTION: Well, why don't you read to us some of these findings that you're talking about.

MR. EWING: I beg your pardon, Justice Marshall?

QUESTION: Why don't you read some of these findings to me? You keep talking about theories, and if they were solid on your point, I suspect you'd read them.

MR. EWING: Well, yes Your Honor. The district court rejected the union's claim that the reason they didn't file discrimination claims was because they could get better results by other means.

And he said, I find this explanation unacceptable. In the first place, it overlooks the numerous instances of harrassment which were indisputably racial in nature, but which did not otherwise plainly violate a provision of the collective bargaining agreement.

Thus, grievances involving no loss of pay or permanent disciplinary record were virtually ignored.

This is on page 138A of the union's petitioners' appendix.

QUESTION: (Inaudible.)

MR. EWING: That's a finding.

And then he says, in the second place, it seems obvious the vigorous pursuit of claims of racial discrimination would have focussed attention upon racial

issues and compelled some change in racial attitudes.

And goes on to say that the -- that the employer's failure to -- or that the union's failure to grieve racial discrimination served to perpetuate the discriminatory environment.

If the Court please, I would like to go on to the statute of limitations question briefly.

Wilson v. Garcia had three holdings. First, 42 USC Section 1988 provides that -- or requires that Federal law govern the characterization of claims for violations of civil rights acts for the statute of limitations purposes.

Second, that under Section 1988, instead of looking at the allegations in each individual case, the Court should look at the history and purpose of the statute in question and select the one most appropriate characterization for all actions under that statute.

And third, following one and two, that the most appropriate characterization for claims under Section 1983, is claims for personal injury.

Now on the union's claim, let me just look at the issue of retroactivity, because I suspect I won't get through --

QUESTION: Sorry to interrupt you, but I have a question that you may not get to, and you've argued

this in your brief. And this other question, I don't think I'll get it out of your brief.

You've referred several times to the failure to grieve racial harrassment claims and to do anything about that.

Now, my understanding is that the Court of Appeals vacated the district court's determination against the employer with regard to racial harrassment.

MR. EWING: That's right, Your Honor.

QUESTION: Now, so, why doesn't that automatically take racial harrassment out of the case for the union as well?

MR. EWING: Well, in the first place, the Court of Appeals affirmed the district -- all of the district court's findings against the union. So obviously, they didn't think that it had that effect.

QUESTION: Well, how can you find that there was no racial harrassment, but blame the union for failing to grieve racial harrassment?

MR. EWING: No, what the -- what the Court of Appeals found was that on the -- not that there was no racial harrassment, but that on the evidence remaining, once they reduce the limitations period, there was not sufficient evidence that the employer tolerated racial harrassment.

It's the toleration of racial harrassment by the employer which constitutes the violation of Title VII in Section 1981.

And the reason it found that was that when you -- there were -- we proved toleration of racial harrassment through anecdotal testimony about many instances where the employer was -- there were complaints made to the employer about racial harrassment, and they didn't do anything.

Or they even -- it was supervisory employees, and they even in a way, somehow, endorsed it.

With respect to the unions, however, the complaints were made to the unions. The unions admitted that they have a policy of treating complaints about racial matters differently from other complaints.

And therefore it is not necessary to build up this accumulation of instances where they tolerated racial harrassment.

QUESTION: Did they admit that even when the only basis for the claim was a racial one, they wouldn't grieve it?

I thought they only admitted that they wouldn't -- that they wouldn't include that in the other matters that they -- that they grieved.

MR. EWING: No, there is no -- no such

limitation on the district court's finding. District court found that --

QUESTION: I'm not talking about its finding. I'm talking about the admission of the union that you just referred to.

MR. EWING: The -- the testimony --

QUESTION: You say that the union admitted that they wouldn't bring harrassment claims. And my understanding is that they only admitted that they would not bring racial claims when there were other claims available to grieve the action that had been taken.

MR. EWING: The testimony --

QUESTION: I don't understand them to have admitted that they would not bring a harrassment claim if that was the only thing available.

MR. EWING: The testimony supports the district court's finding that the union was reluctant to, and avoided submitting racial discrimination grievances.

And neither the testimony nor the district court's finding is limited to situations where there were other grounds to pin the grievances on.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ewing.

MR. EWING: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Weinberg, you

have two minutes remaining.

QUESTION: (Inaudible) the answer to my question about the filings. Do you have any comment?

REBUTTAL ARGUMENT OF ROBERT M. WEINBERG, ESQ.,
ON BEHALF OF PETITIONERS

MR. WEINBERG: Yes, Your Honor. With particular respect to the racial harrassment claim, number one, there was no evidence whatsoever that the union admitted, quote, to treating -- to not -- to having a policy of not raising race discrimination when there was no other grounds.

Our brief is full -- I think we have every reference in the Joint Appendix, which is every reference in the testimony, to where the policy, if you could call it that, was stated.

It was stated as often by plaintiffs' witnesses as by the union's witnesses, and in every case, it was based on there being other grounds for the grievance.

Second of all --

QUESTION: Is there any specific finding contrary to that point?

MR. WEINBERG: There is -- there is no finding that I -- that the union refused -- there is no finding that the union refused to process race discrimination

grievances.

There is a finding that they were reluctant when there were other grounds. The court said that that rationale wouldn't apply to the situation of racial harrassment where there was no loss of pay or no discipline.

But he didn't make a finding that the union in fact had that policy. And in fact, one of the issues we would have -- we did argue to the Court of Appeals, and which the Court of Appeals didn't reach, because it vacated the racial harrassment finding, was that in the entire 12-year period, only 13 instances of racial harrassment were brought to the union's attention, and in 10 of those the union took action.

And I want to add one other thing, because the evidence is also very clear on this.

The union had another means to take care of racial discrimination problems that didn't involve other contract provisions.

The contract provided for a joint union-company civil rights committee which was ideally suited for that very purpose, to take care of problems that could not be handled through the grievance process, or weren't particularly well suited for that.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Weinberg.

The case is submitted.

MR. WEINBERG: Thank you.

(Whereupon, at 11:52 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#85-1626 - CHARLES GOODMAN, ET AL., Petitioners V. LUKENS STEEL COMPANY, ET AL.; and

#85-2010 - UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., Petitioners V. CHARLES GOODMAN, ET AL.

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anscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)