

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-495

TITLE ANSONIA BOARD OF EDUCATION, ET AL., Petitioners V.  
RONALD PHILBROOK, ET AL.

PLACE Washington, D. C.

DATE October 14, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANSONIA BOARD OF EDUCATION, :

4 ET AL., :

5 Petitioners, :

6 v. : No. 85-495

7 RONALD PHILBROCK, ET AL. :  
8 -----x

9 Washington, D.C.

10 Tuesday, October 14, 1986

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:05 a.m.

14 APPEARANCES:

15 THOMAS N. SULLIVAN, ESQ., Hartford, Connecticut; on  
16 behalf of the petitioners.

17 ROBERT F. McWEENY, ESQ., for respondent Ansonia  
18 Federation of Teachers in support of petitioners.

19 DAVID N. ROSEN, ESQ., New Haven, Connecticut; on behalf  
20 of respondents.

21 CHARLES FRIED, ESQ., Solicitor General, Department of  
22 Justice, Washington, D.C.; for the United States  
23 and EEOC, as amici curiae, in support of  
24 respondents.  
25 - - -

C O N T E N T S

ORAL ARGUMENT OF:

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THOMAS N. SULLIVAN, ESQ.,

on behalf of petitioners

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ROBERT F. McWEENY, ESQ.,

for respondent Ansonia Federation

of Teachers in support of petitioners 21

DAVID N. ROSEN, ESQ.,

on behalf of respondents

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for the United States and EEOC,

as amici curiae, in support of

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for Respondent Ansonia Federation of

Teachers in Support of Petitioners

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Ansonia Board of Education against Ronald Philbrook.

You may proceed when you're ready, Mr. Sullivan.

ORAL ARGUMENT OF THOMAS N. SULLIVAN, ESQ.,  
ON BEHALF OF THE PETITIONERS

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

This case raises two issues with regard to the provisions of Title VII of the Civil Rights Act of 1964, which prohibit discrimination by an employer against an employee because of his religion.

The first issue is whether an employee who needs to be absent from work to observe his religion, and who is provided a combination of paid leave and unpaid leave for that purpose, proves a prima facie case of discrimination under Title VII, based upon the employer's refusal to compensate him for all of his absence for religious observance.

The second question posed is whether an employer who has implemented a reasonable accommodation



1 of an employee's religion, is nevertheless required to  
2 accept the accommodation the employee prefers, absent  
3 the showing of undue hardship and the conduct of the  
4 employer's business.

5 Now, the essential facts in this case are as  
6 follows:

7 The respondent, Ronald Philbrook, is a public  
8 high school teacher, employed by the petitioner, Ansonia  
9 School Board, as a business teacher.

10 Since 1968, Philbrook has been a member of the  
11 Worldwide Church of God, and as such, he is required by  
12 his faith to absent himself for approximately six days a  
13 year from his employment to observe religious holy days.

14 Under the governing collective bargaining  
15 agreement, all of the school board's teachers, including  
16 Philbrook, are provided three days annual paid leave for  
17 religious observance.

18 Teachers are also provided under the agreement  
19 with 18 days of annual leave for other reasons, such as  
20 illness. And these are confined to specific numbers of  
21 days per occurrence per reason.

22 Teachers are also provided, in addition to the  
23 three days for religious observance and the 18 days of  
24 annual leave, with three days of annual leave for  
25 necessary personal business.

1 Under the specific provisions of the  
2 bargaining agreement, these days may not be used for any  
3 reason for which leave is otherwise provided under the  
4 bargaining agreement. And they may be used only for  
5 reasons which require a teacher's absence from work.

6 QUESTION: Is that so during the entire period  
7 here?

8 MR. SULLIVAN: No, it wasn't. Your Honor,  
9 early on in the bargaining relationship between the  
10 union and the school board, the leave provisions were  
11 more lenient in that respect.

12 QUESTION: Between, what was it --

13 MR. SULLIVAN: '67 and '68.

14 QUESTION: -- '67 and '69, they could use  
15 those three days, as far as we know, for anything they  
16 wanted?

17 MR. SULLIVAN: That's correct.

18 QUESTION: But nonetheless, Philbrook was not  
19 allowed to use it for religious reasons.

20 MR. SULLIVAN: The record is not clear on  
21 that. The evidence in terms of Philbrook's absences for  
22 religion relate back to the 1970-71 school year, which  
23 you can see set forth in the appendix to our brief.

24 The record is not clear in this case as to how  
25 he was treated prior to that time. It's our

1 understanding that he was allowed, up until the 1970-71  
2 school year, all of the leave he needed, with pay, for  
3 religious observance.

4 So that the change came when the parties to  
5 the bargaining agreement negotiated specific  
6 restrictions on the use of personal leave.

7 Now, because the bargaining agreement --

8 QUESTION: Counsel, is it possible, since the  
9 court below didn't really decide these factual questions  
10 on how the three-day personal leave provision was in  
11 fact administered, or how Mr. Philbrook was treated with  
12 regard to it, that some remand might be necessary on the  
13 703 issue?

14 MR. SULLIVAN: Your Honor, we don't think so,  
15 and for this reason: We feel that the record in this  
16 case permits no other conclusion than that the leave  
17 provisions of the contract have been consistently  
18 interpreted in accordance with the explicit provisions  
19 of the contract so as to preclude the use of necessary  
20 personal business leave. And that's the leave we're  
21 really talking about here, those three days which  
22 Philbrook claims ought to be allowed for religious  
23 observance.

24 Those three days, under the contract, cannot  
25 be used for any reason for which leave is otherwise

1 provided. And the administration of the school system  
2 has determined --

3 QUESTION: Even under the terms of the  
4 contract, it looks like the one day which can be granted  
5 on the request of the teacher alone without any inquiry  
6 at all would lend itself to use for any purpose  
7 whatever, in practice.

8 MR. SULLIVAN: We don't agree with that, Your  
9 Honor. The one day that the teacher can use by only  
10 stating the reason is a personal reason still can only  
11 be used under the contract for reasons which require the  
12 teacher's absence from work.

13 And that one day, even though discretionary in  
14 the sense that the teacher need only state, it's for a  
15 personal reason, cannot be used for one of the reasons  
16 for which leave is otherwise provided.

17 We feel the contract is clear on that. And  
18 the record shows that the superintendant of schools  
19 strictly enforced these leave provisions. There's no  
20 evidence to the contrary.

21 QUESTION: You're just saying that this -- as  
22 to this one day, it's not practically enforceable, and  
23 it's left up to the conscience and responsibility of the  
24 teacher.

25 MR. SULLIVAN: That's correct. A teacher can



1 be disciplined after the fact, if it's found out that  
2 the day was improperly used.

3 QUESTION: What's the purpose of the  
4 provision, that one day provision? That it may be  
5 something so confidential that the teacher wouldn't want  
6 to spread it on the record, or something of that sort?

7 MR. SULLIVAN: We don't have any bargaining  
8 history on that, so it's simply a matter of conjecture.  
9 But I would say. In collective bargaining agreements,  
10 personal day leave provisions, it's not unusual to give  
11 a teacher a discretionary day, because the reason may be  
12 so personal as to cause embarrassment if it's shared  
13 with anyone else.

14 But it still must be a day that requires the  
15 teacher's absence from work.

16 QUESTION: What does that mean?

17 MR. SULLIVAN: It means that the business --

18 QUESTION: It means that you can't be in  
19 school and some place else at the same time.

20 MR. SULLIVAN: No, Your Honor, it means, I  
21 think, that the particular reason --

22 QUESTION: Well, what if you want to go to a  
23 wedding, like yours, I mean, like the teacher's. You  
24 know, they could have put it on a Sunday or a Saturday.

25 MR. SULLIVAN: The leave provisions do provide

1 leave for wedding already.

2 QUESTION: Well, what does it mean, require to  
3 be away from work?

4 MR. SULLIVAN: The interpretation of the  
5 contract, as indicated by the superintendant of schools  
6 in his testimony, is that the reason for the leave must  
7 concern a matter than cannot be handled outside the  
8 workday.

9 So in that sense, it's necessary personal  
10 business. In other words, arrangements cannot be made  
11 outside of work to conduct that particular business.

12 QUESTION: So I have to meet my mother-in-law  
13 at the airport. That qualifies?

14 MR. SULLIVAN: It might depend on the  
15 consequences of not meeting your mother-in-law. I don't  
16 know, Your Honor.

17 QUESTION: What about yours? What about yours?

18 MR. SULLIVAN: Those are the kind of judgment  
19 calls, obviously, that have to be made in administering  
20 these kinds of provisions. And I don't think you can  
21 make a conclusive list, in this area.

22 QUESTION: I'm buying a house and I want to be  
23 present when the engineer looks at it to give me an  
24 estimate on what repairs are necessary.

25 MR. SULLIVAN: If the arrangements cannot be

1 made on another day, then that might very well  
2 constitute necessary personal business.

3 Now, because the bargaining agreement limits  
4 paid leave for religious observance to three days per  
5 year, and Philbrook generally needs more, the school  
6 board has allowed Philbrook the additional time off  
7 without pay.

8 Dissatisfied with this arrangement, and having  
9 satisfied the jurisdictional requirements, Philbrook  
10 brought suit in District Court, claiming a violation of  
11 Title VII, as well as the First Amendment, based on the  
12 school board's failure to compensate him in some way for  
13 all of his days of leave caused for religious observance.

14 The District Court found no discrimination,  
15 and dismissed the complaint.

16 The Court of Appeals reversed, deciding only  
17 the statutory issue, and remanded for a determination as  
18 to whether any of the accommodations proposed by  
19 Philbrook could be implemented without undue hardships.

20 And those proposed accommodations essentially  
21 involved the use of those three necessary personal leave  
22 days for religious observance, or the payment of the  
23 cost of a substitute teacher, which would have lessened  
24 the economic impact on Philbrook for having to take that  
25 time off without pay.

1 Philbrook had also proposed that he be allowed  
2 to do some other meaningful work in conjunction with one  
3 of those accommodations.

4 In reversing the District Court and remanding  
5 the case, the Court of Appeals held that Title VII  
6 requires an employer to accept an employee's proposed  
7 accommodation, where the employer and the employee each  
8 propose a reasonable accommodation to the employee's  
9 reasonable beliefs.

10 QUESTION: Didn't they say, unless there was  
11 undue hardship, or something like that?

12 MR. SULLIVAN: Yes, the Court of Appeals  
13 viewed the reasonable accommodation provisions as  
14 necessarily having to involve a determination of undue  
15 hardship on the employer, the theory apparently being  
16 that unless there is some hardship, short of undue  
17 hardship on an employer, the employer has to go beyond  
18 the reason accommodation it has made, and consider the  
19 proposal of the employee.

20 QUESTION: Isn't that what the EEOC  
21 regulations seem to require?

22 MR. SULLIVAN: Yes, I think so. And because  
23 the EEOC regulations guidelines -- not regulations -- do  
24 indicate that the employer has to attempt to implement  
25 the accommodation which least disadvantages the employee



1 in terms of, in this case, compensation.

2 This Court has, of course, stated on several  
3 occasions that the EEOC guidelines do not have the force  
4 of law. And we feel that the guidelines, in that  
5 particular respect, are in conflict with the plain  
6 language of the statute.

7 Title VII makes it an unlawful employment  
8 practice for an employer to fail or refuse to hire or  
9 discharge any individual, or otherwise to discriminate  
10 against any individual with respect to his compensation,  
11 terms, or conditions, or privileges of employment,  
12 because of such individual's religion.

13 The statute defines religion to include all  
14 aspects of religious observance and practice, as well as  
15 belief, unless an employer demonstrates that he is  
16 unable to reasonably accommodate to an employee's or  
17 prospective employee's observance or practice without  
18 undue hardship on the conduct of the employer's business.

19 QUESTION: Mr. Sullivan, how would you define  
20 what is a reasonable accommodation under Title VII?

21 MR. SULLIVAN: Your Honor, I would define a  
22 reasonable accommodation as one that resolves the  
23 conflict between the employee's religious needs, in this  
24 case in terms of religious observance, and his job  
25 requirements.

1                   And that is, I think, the crucial factor in  
2 this case. Because the employer has implemented an  
3 accommodation, which resolves the conflict between  
4 Philbrook's need to be on the job and his need for  
5 religious observance, a reasonable accommodation has  
6 been made.

7                   And the statute has been satisfied as a  
8 result.

9                   Consequently, we feel that the District Court  
10 was correct in determining that Philbrook had not  
11 established a prima facie case of discrimination.

12                  Now, the Court in doing that implemented a  
13 three-pronged test to determine whether or not there was  
14 a prima facie case of discrimination in this case.

15                  First of all, the Court said: Is there a  
16 conflict between the employee's religious needs and the  
17 job requirements?

18                  Seccondly, has the employer informed the  
19 employee of this conduct?

20                  And thirdly, has the employee been disciplined  
21 as a result of a failure to comply with the job  
22 requirements.

23                  In this case, we feel there's no conflict, as  
24 I've indicated in response to Justice O'Connor's  
25 question.

1           And thirdly, there's been no discipline in any  
2 sense. Certainly Philbrock's not been discharged from  
3 his employment. He's not been deprived of any benefit  
4 to which he would otherwise have been entitled except  
5 for his religion.

6           He's not been disciplined in any way.

7           QUESTION: Would you take the position, Mr.  
8 Sullivan, that an employer who's told employees they  
9 could have no time off for any personal reason or any  
10 religious purpose whatever, except to the extent they  
11 want to take time without pay -- you won't lose your job,  
12 but you can take the time off; you just won't be paid  
13 for it.

14           Is that a reasonable accommodation, in your  
15 view?

16           MR. SULLIVAN: Well, I'm not sure I understand  
17 your question.

18           If the employer is saying -- if the employer  
19 provides some kind of paid leave, but no leave for  
20 religious observance, I would view that as clearly  
21 discriminatory.

22           QUESTION: No paid leave for any purpose, but  
23 you can take time off for personal or religious reasons,  
24 without pay. Is that, in your view, a reasonable  
25 accommodation?

1 MR. SULLIVAN: Yes.

2 Because the three-prong test of religious --  
3 to determine a prima facie case of discrimination was  
4 not met in this case --

5 QUESTION: Excuse me, because this ties in  
6 with what Justice O'Connor just asked.

7 You answered the way you did, I presume,  
8 because the employer in that hypothetical is being -- is  
9 treating both religious and nonreligious leave  
10 equivalently?

11 MR. SULLIVAN: That's correct, Your Honor.

12 QUESTION: Now, is he doing the same here?  
13 How do we know that three days of leave for days of  
14 rest, religiously required, how do we know that that's  
15 enough, that that's equivalent to 18 days for  
16 nonreligious reasons?

17 How do we know that that's an equivalent  
18 treatment of religion?

19 MR. SULLIVAN: Well, we don't. I'm not sure  
20 that the mere fact that the leave provisions are  
21 under-inclusive, in the sense that they do not provide  
22 Philbrook all the leave he needs for religious  
23 observance, is determinative of the issue.

24 QUESTION: Oh, it isn't that they don't  
25 provide him all that he needs. The issue is whether,



1 without the use of those three other days, the employer  
2 is treating religious leave and leave for other than  
3 religious purposes equally.

4 And I look at it. And gee, there are only  
5 three days for religion, and there are 18 days for other  
6 than religion. So we really don't have the kind of  
7 hypothetical that Justice O'Connor gave you, where you  
8 get no leave for any reason; no paid leave for either  
9 religion or nonreligion.

10 MR. SULLIVAN: Well, Your Honor, I don't  
11 believe that Title VII requires an employer to provide  
12 that kind of equal treatment.

13 What Title VII indicates is that employees  
14 shall not be discriminated against on the basis of their  
15 religion. And if, in fact, there is some evidence of  
16 discrimination, then that triggers the duty to  
17 accommodate.

18 QUESTION: So you can give -- suppose it said  
19 18 days for any reason except religious; that's all  
20 right?

21 MR. SULLIVAN: I think that would be perfectly  
22 all right, absent a showing of discriminatory intent or  
23 motive.

24 QUESTION: What do you mean, discriminatory?  
25 I don't understand. Isn't that discriminatory on its

1 face? Any reason will suffice except a religious reason?

2 MR. SULLIVAN: Well, that's not what the leave  
3 provisions say, though.

4 QUESTION: No, I understand that. Suppose he  
5 just gave them, you know, 18 days for other than  
6 religious reasons; two hours for religious reasons. At  
7 what point does it become nondiscriminatory? How do you  
8 know that three days is enough to make it  
9 nondiscriminatory?

10 MR. SULLIVAN: I would agree that there would  
11 be some point where, on the face of the bargaining  
12 agreement, so much accommodation has been made to  
13 secular needs, and so little accommodation made to  
14 religious needs, that on the face of the provisions, the  
15 leave provisions are discriminatory.

16 I do not believe that this is a case like that.

17 QUESTION: Maybe not. I just don't know what  
18 the test is. Is the test, perhaps, that there was some  
19 estimate by those who bargained in the collective  
20 bargaining agreement as to how much time off the average  
21 employee needs for all these other purposes. And when  
22 they figured it all out, the average employees needs 18  
23 days for nonreligious, and three days for religious?

24 MR. SULLIVAN: Your Honor, I'll confess I have  
25 no idea where these leave provisions came from. There's

1 no bargaining history to indicate why the parties  
2 through the years structured this kind of a leave  
3 provision.

4 QUESTION: Well, Mr. Sullivan, it isn't quite  
5 right, is it, that the normal employee would get all 18  
6 days? For example, it's not every year that you have a  
7 death in the immediate family, a family funeral to --  
8 all those, I assume, happen infrequently rather than  
9 regularly.

10 MR. SULLIVAN: Your Honor, I think that's  
11 correct, and I think that's important in determining the  
12 reasonableness of the leave provisions in this  
13 particular case.

14 QUESTION: And isn't it true that except for  
15 the three days of personal leave, each of the other 15  
16 days is earmarked for a specific, narrow purpose?

17 MR. SULLIVAN: That's correct, Your Honor.

18 QUESTION: And so the question is whether you  
19 can impose the limit on the three days for personal  
20 leave provision.

21 MR. SULLIVAN: And of course that limit is no  
22 different from the limit imposed on the other reasons  
23 for which leave is provided.

24 I would also say this, and the record  
25 indicates, that for teachers such as Philbrook, who

1 needs the three days leave with pay every year, those  
2 are guaranteed to occur in terms of the cost impact on  
3 the employer.

4 The other leaves may or may not occur.  
5 Certainly the necessary personal business leave may  
6 never occur for any teacher, hypothetically speaking.

7 QUESTION: Mr. Sullivan, would an employer's  
8 policy that just says, across the board, no personal  
9 leave for anyone for any purpose, meet the requirements  
10 of Title VII for religious accommodation?

11 MR. SULLIVAN: No leave for any purpose or for  
12 any reason?

13 QUESTION: Right.

14 MR. SULLIVAN: I would say that in that case  
15 there would still be a duty on the part of the employer  
16 to attempt to accommodate the employee's religious  
17 beliefs.

18 QUESTION: May I ask one other question? Does  
19 the record tell us how frequently, for the work force in  
20 general, the personal leave privilege was exercised?

21 I noticed for eight years in a row, the  
22 respondent didn't take any personal leave. Do most  
23 employees take some?:

24 MR. SULLIVAN: The evidence indicates, Your  
25 Honor, that for the last year, the most recent year for



1 which we have any information, in 1983-84, which is the  
2 year that impacted the time of trial, two teachers, out  
3 of a total of 150, had used all of their necessary  
4 personal business leave days.

5 So the record indicates that these days are  
6 not frequently used.

7 QUESTION: And what would you say if the  
8 employer gave paid leave only to people who wanted off  
9 for religious purposes? No paid leave for anybody else  
10 for any other reason. Now, is that -- could you do that?

11 MR. SULLIVAN: No paid leave for any reason,  
12 but paid leave only for religion?

13 Well, I feel that --

14 QUESTION: That certainly is an accommodation.

15 MR. SULLIVAN: That would be an accommodation,  
16 certainly, and I think the private employer could do  
17 that. I think --

18 QUESTION: Well, isn't the person who wants  
19 personal leave off for some other -- for some secular  
20 purpose, says, Mr. Employer, you give this fellow time  
21 off for going to church; I want to go attend a class at  
22 the university. And you're discriminating against me.

23 MR. SULLIVAN: If Title VII is interpreted to  
24 require that kind of result --

25 QUESTION: No, not Title VII; this is a

1 preference for religion.

2 MR. SULLIVAN: It could constitute a  
3 preference for religion. If a school board did do that

4 --

5 QUESTION: But an employer could do that, but  
6 a school board couldn't?

7 MR. SULLIVAN: I don't think a school board  
8 could do that, Your Honor.

9 CHIEF JUSTICE REHNQUIST: Mr. Sullivan, your  
10 time has expired.

11 We'll hear now from Mr. McWeeny.

12 ORAL ARGUMENT OF ROBERT F. McWEENY, ESQ.,  
13 FOR RESPONDENT ANSONIA FEDERATION OF TEACHERS  
14 IN SUPORT OF PETITIONERS

15 MR. McWEENY: Mr. Chief Justice, and if it  
16 pleases the Court:

17 I represent the union, party to this  
18 collective bargaining agreement. And I speak in support  
19 of the school board and the petition.

20 I'd like to address some of the factual  
21 concerns about the leave policy. In addition to the  
22 record showing that only two of the 150 teachers use  
23 three days, plaintiff's Exhibit 18 shows that most  
24 teachers took no personal -- necessary personal business  
25 days during the year.

1           And I think also we have the superintendant of  
2 schools' testimony about the professional nature of the  
3 employees, and that they abide by those restrictions  
4 that it be necessary business, and also that it be  
5 business that cannot -- despite all reasonable efforts  
6 -- be planned and conducted outside of a time which  
7 conflicts with a 180-day work year for employees.

8           I'd also like to point out that the 18 days of  
9 leave -- I think the record shows in Connecticut by  
10 state statute 15 days has to be afforded teachers for  
11 sick leave, so that's the major portion of that 18 days  
12 -- I'd also point out that one of the uses of the 18  
13 days of annual leave is for immediate family religious  
14 ceremony. So there is, I think, no bias toward  
15 religious practices.

16           In addition to the three days of religious  
17 observances, religious ceremony, immediate family  
18 religious ceremony --

19           QUESTION: Well, what's the differences  
20 between those two, Mr. McWeeny? The immediate family  
21 religious ceremony, and the religious activity.

22           MR. McWEENY: Well, I would just offer that to  
23 -- the religious ceremony would be similar to the other  
24 types of activity. And I think it shows that the leave  
25 policy does not discriminate against religion in the

1 overall leave policy, as well as affording a specific  
2 leave for religious practice, or religious observance.

3 QUESTION: But as I understand it, you  
4 couldn't use any of -- if you've used the three days you  
5 want for religious observances, under the contract, you  
6 could not then use some of the 18 days for other  
7 religious observances like the ones the three days are  
8 devoted to.

9 MR. McWEENY: That's correct; you could not.  
10 And I would also submit that the --

11 QUESTION: I don't understand that at all. I  
12 understood you could not use any of the three days for  
13 that, but --

14 MR. McWEENY: Well, you could not claim it was  
15 a sick day. Sick days, or for leave -- the general  
16 leave provision, that annual leave provision, sets for  
17 specific reasons for which it can be availed. It is not  
18 vacation. It is sick days. It is other specific types  
19 of personal necessities.

20 QUESTION: The three religious days off are  
21 day-of-rest provisions, right?

22 MR. McWEENY: That's correct, religious  
23 practice.

24 QUESTION: For days when your religion doesn't  
25 allow you to work.



1                   And as I understand the scheme, if you wanted  
2 off for another religious reason, not because it's a day  
3 of rest, because you want to make a religious retreat or  
4 something like that, as far as we know, after 1969, at  
5 least, that could have been -- that could have come  
6 within the three day "other" provision, right?

7                   MR. McWEENY: That's true. That could have,  
8 in the sense that there is no evidence in the record  
9 that Mr. Philbrook or anyone else asked for, was denied,  
10 a personal leave day for counselling with a religious  
11 official, or a request of that nature.

12                   I'd like to also address the statutory  
13 construction issue, which I think is at the heart of  
14 this case. The Second Circuit stated that the  
15 interpretation of Title VII with respect to reasonable  
16 accommodation and undue hardship was crucial to the  
17 resolution of the case.

18                   I agree. I submit that they erred on that  
19 construction. I think the language clearly indicates  
20 that reasonable accommodation is the obligation of the  
21 employer and the union; and that once that is met,  
22 there's no reason to go beyond that determination that  
23 there's been a reasonable accommodation of the  
24 employee's religious practices.

25                   Undue hardship really, in effect, creates a

1 defense to a failure to reasonable accommodate. And in  
2 terms of allowing a person to resolve that conflict  
3 between their religious practices and their employment  
4 obligations in a manner which allows them to continue  
5 the employment.

6 I think that the cases the Second Circuit  
7 talks about, or those termination cases, where clearly  
8 there was no reasonable accommodation or there's a  
9 reason to inquire whether there was a reasonable  
10 accommodation, or whether something could have been to  
11 allow a reasonable accommodation, in the sense of  
12 allowing an employee to continue in his employment and  
13 observe his religious obligations.

14 I'd also like to speak to a claim that Mr.  
15 Philbrook makes that he is really in a situation of  
16 substantial pay, no work. I submit that the only  
17 evidence referred to by Mr. Philbrook is three pages of  
18 the transcript which have nothing to do with that which  
19 merely state that there was education going on because  
20 he had a plan for the students to following during the  
21 course of the year. And that in that -- in those three  
22 pages of transcript, evidence designed to deal with the  
23 question of whether there was a problem with the  
24 educational experience caused by the use of substitute  
25 teachers.

1 And I think there's nothing in there that  
2 talks about the amount of time that would be spent, or  
3 that in effect there is no work without pay.

4 I would think that at this time I would like  
5 to leave the few minutes that are remaining to me for  
6 rebuttal.

7 CHIEF JUSTICE REHNQUIST: Very well.

8 We will hear now from you, Mr. Rosen.

9 ORAL ARGUMENT OF DAVID N. ROSEN, ESQ.,

10 ON BEHALF OF RESPONDENTS

11 MR. ROSEN: Mr. Chief Justice, and may it  
12 please the Court:

13 Anscnia has drawn an explicitly religious line  
14 through its personal leave rule, disfavoring religious  
15 exercise, prohibiting religious exercise.

16 This explicitly religious line is  
17 presumptively unlawful, and there were no findings  
18 addressing or supporting the claims of lawfulness of  
19 this explicitly religious line that were made by the  
20 District Court.

21 QUESTION: Why is it an explicitly religious  
22 line? As I understand their scheme, you can use these  
23 three days for anything, religious or nonreligious, so  
24 long as it's not one of the things for which days are  
25 specifically provided for.

1           Now, there are some things for which days have  
2 been specifically provided for that are secular, and  
3 there are other things that are religious, it seems to  
4 me.

5           MR. ROSEN: Your understanding -- I have to  
6 disagree with the understanding you were given a couple  
7 of minutes ago.

8           The contracts, all of the contracts, say that  
9 personal leave may not be used not only for mandatory  
10 religious observance, which is specifically provided for  
11 in the religious leave, but also may not be used for  
12 quote any religious observance unquote.

13           Those are the more recent contracts. The  
14 earlier contracts used similar language, saying that  
15 personal leave cannot be used for, quote, any religious  
16 activity.

17           So what I would call the claim of neutrality  
18 between religious and secular uses, that is, that a  
19 neutral reason has been chosen for excluding religion  
20 from the ambit of personal leave, is in fact  
21 nonexistent.

22           In this contract, these contracts, because the  
23 provisions aren't parallel --

24           QUESTION: We just have a dispute as to the  
25 contractual interpretation, then. Never mind the



1 statutory issue.

2 MR. ROSEN: Yes, that's right. Except that my  
3 statutory interpretation does have going for it the  
4 statutory language. For example, on page 92 of the  
5 joint appendix, personal business shall not include,  
6 without limitation, colon, f, any religious activity.  
7 So --

8 QUESTION: But if the board is telling us that  
9 it interprets the contract the other way, why do we have  
10 to get in a fight over what the contract means? Can't  
11 we decide the case on the assumption that the board will  
12 apply the contract the way it represents it now  
13 interprets it?

14 I mean, I didn't realize that this was going  
15 to be a contracts case. I thought it was Title VII.

16 MR. ROSEN: The representation -- I should say  
17 the representation was made by the union, not the  
18 board. I don't know what the board's position is.

19 QUESTION: Oh, I think the board's position is  
20 the same, as I understand it. That those three days can  
21 be used for anything not specifically covered by other  
22 days off, religious or nonreligious.

23 MR. ROSEN: That understanding has been  
24 communicated for the first time here today. And I think  
25 that if we take that to be the understanding, an

1        unfairness remains, which is -- can be seen by taking  
2        the example of Mr. Philbrook and a colleague, each of  
3        whom uses the three days for religious holidays to  
4        satisfy religious needs.

5                The hypothetical colleague then uses the  
6        fourth day to fulfill, let us say, a deeply held but  
7        nonreligious ethical commitment to aid the poor by  
8        working in a soup kitchen. This would be permissible  
9        use of personal business leave.

10               The teacher would simply note the use of  
11        personal business leave.

12               Mr. Philbrook could not work beside his  
13        colleague in the soup kitchen if that work in the soup  
14        kitchen were part of a religious holy day obligation of  
15        his church, if the soup kitchen were sponsored by his  
16        church.

17               So the line is an explicit religious line.  
18        There are no findings in the District Court to uphold  
19        that line.

20               QUESTION: Is it as clear as you suggest that  
21        this personal religious thing that is embraced within  
22        the 18 days might not be extended to the soup kitchen  
23        example, if Mr. Philbrook felt a religious desire to do  
24        that?

25               MR. ROSEN: The -- what is embraced within the

1 18 days is religious ceremonies, which says -- in the  
2 contract after it, there's a parenthetical description  
3 saying, Bar Mitzvah, ordination, first vows, and the  
4 like.

5 There was in fact, and there is in the record,  
6 evidence of an arbitration proceeding on behalf of Mr.  
7 Philbrook in which it was argued that he would like to  
8 apply that leave category to his own religious  
9 observance, and as a matter of contractual  
10 interpretation, it was held that that applied only to  
11 this -- things like Bar Mitzvahs and so forth.

12 QUESTION: Mr. Rosen, can I ask you a question  
13 about your facial reading of the contract?

14 I happen to have the contract in the cert  
15 petition at page 4A and 5A before me; I guess that's the  
16 most recent one.

17 If you eliminated the provision for mandated  
18 religious observance in paragraph 10, and also  
19 eliminated subparagraph 4 of the exclusion for any  
20 religious observance, but retained the exclusion for all  
21 other purposes set forth in the agreement, would that  
22 contract then avoid violating Title VII?

23 MR. ROSEN: Yes, yes. That is --

24 QUESTION: Let me follow up with another  
25 question.

1           Would that contract be more or less favorable  
2       to your client?

3           MR. ROSEN: It would less favorable. And our  
4       claim is not that Mr. Philbrook is entitled to some  
5       particular measure of favorable treatment. It is that  
6       in the according of whatever treatment he is given,  
7       whatever accommodation is made for his needs, that it be  
8       on a nondiscriminatory basis.

9           QUESTION: Then let me ask you an intermediate  
10      question. Suppose you take the contract as it is and  
11      merely delete the words, excluding for any religious  
12      observance, but retain the words, purposes set forth  
13      under any other leave provision, which would of course  
14      have the same effect.

15           Would that be facially bad, or would that be  
16      permissible?

17           MR. ROSEN: No, it would still be  
18      discriminatory. Because although it --

19           QUESTION: It would treat the religious leave  
20      just like all other kinds of leave. But that would be  
21      explicitly anti-religious.

22           MR. ROSEN: Well, let me give an example that  
23      I hope will explain why that would be unfair.

24           Let's assume that an employer, perhaps a  
25      private employer, sets aside space for its employees for



1 religious observance; a chapel, if you will.

2 And the employer also has a lounge. The  
3 employer, we suggest, could not put a sign up in the  
4 lounge, "No reading the Bible in the lounge." Or to be  
5 more exact: "No reading the Bible in the lounge for  
6 religious purposes." Even though space had been set  
7 aside specifically and exclusively for religious reasons.

8 Now, perhaps to take your example --

9 QUESTION: No, but it would have to be changed  
10 to say, "You don't get paid for reading the Bible in the  
11 lounge." Because there's no specific prohibition  
12 against it. It's only that you don't get paid for those  
13 days.

14 MR. ROSEN: Well, except that my analogy is,  
15 I'm using -- I'm using available space instead of money  
16 paid. But as far -- but the thing -- we make no general  
17 claim to paid leave. We are entitled to paid leave here  
18 only because paid leave is accorded for personal  
19 business, which is, except for the specifically  
20 religious exclusion, something that would cover the  
21 religious exercise for which Mr. Philbrook needs the  
22 leave.

23 Now, Justice Stevens, to follow up, and also  
24 Justice Scalia, the point you were making about what  
25 I've termed neutrality, the claim of neutrality, it's

1 true that the definition, the contract, if it were  
2 changed, would be framed in terms of, any leave  
3 otherwise provided for in the contract.

4 But with our hypothetical employer, let's  
5 assume that there was also a periodical room made  
6 available to the employees. The employer, we suggest,  
7 still could not say, "No reading the Bible for religious  
8 purposes, or reading periodicals, or performing any  
9 activity for which space is otherwise provided in the  
10 lounge."

11 We think that would still be a line that was  
12 drawn on an explicitly religious basis and we --

13 QUESTION: Mr. Rosen.

14 MR. ROSEN: Yes, sir. Yes, ma'am.

15 QUESTION: Is there any reason under Title VII  
16 why the accommodation made by the employer cannot be  
17 broken down to provide so many days a year sick leave,  
18 so many days a year for business necessity, and so many  
19 days a year for religious observance?

20 MR. ROSEN: There is none. Our claim is --

21 QUESTION: You wouldn't claim that that kind  
22 of a breakdown is inherently discriminatory under Title  
23 VII?

24 MR. ROSEN: We would not. We claim no  
25 entitlement to use the days which are set aside for

1 illness for religious observance.

2 The difference we see, the fundamental  
3 difference, between illness and personal business leave  
4 is like in kind and character to the kind of conduct --  
5 in my soup kitchen example, it could be the identical  
6 conduct -- to what is permitted. And the difference is  
7 the difference only made by drawing an explicit  
8 religious line by the employer across that leave.

9 Now --

10 QUESTION: Well, is it invalid for the  
11 employer to say, so many days a year sick leave, so many  
12 days a year secular-purpose leave, of any kind, and so  
13 many days a year for religious observance?

14 MR. ROSEN: Yes. That we think would be  
15 invalid. We think that the line that is drawn --

16 QUESTION: Even if the fact-finder determines  
17 that the amount given for religious accommodation is in  
18 fact reasonable?

19 MR. ROSEN: Yes, because the claim is one not  
20 of accommodation but of discrimination.

21 We think that it does not make a difference if  
22 the employer gives no days for religion, or gives  
23 several days for religion. And I recur to the chapel  
24 example.

25 Even if the chapel is a large and beautiful

1 structure, much grander, let us say, than the lounge,  
2 what is obnoxious under Title VII is the drawing of  
3 explicit religious lines which disfavor religion.

4 That, at minimum, is presumptively unlawful,  
5 and --

6 QUESTION: That's your claim under Section  
7 703a-1, or whatever it is?

8 MR. ROSEN: Yes. The anti -- that is the  
9 anti-discrimination right.

10 QUESTION: Well, I suppose, if the employer  
11 just cut out the three days for religion and said, three  
12 days for personal leave of any kind, including religion;  
13 that would satisfy you?

14 MR. ROSEN: That would be nondiscriminatory.  
15 It would be, in a sense, less favorable than what is now  
16 provided. But if there is a nondiscriminatory provision  
17 -- it could be three days, it could be six days, it  
18 could be some number of days in between --

19 QUESTION: Your client would be no better off?

20 MR. ROSEN: Our client would be no better --  
21 he would be free of the discrimination, but he would be  
22 no better off.

23 Our claim is not that he's entitled -- it's  
24 not essentially that he's entitled to any fixed amount  
25 of leave. It is that in the provision of leave, he is



1 entitled to be free from discrimination.

2 QUESTION: Well, then, if the employer said,  
3 we don't have any leave around here on pay; no paid  
4 leave whatsoever. But there's unpaid leave up to 18  
5 days a year for anything.

6 MR. ROSEN: That would probably -- probably  
7 still be all right under Title VII.

8 You see our -- my client is put, as anyone  
9 else is, into the collective bargaining process. And if  
10 what comes out of that process is three days, or six  
11 days, of general purpose personal leave --

12 QUESTION: Well, is the school board in any  
13 trouble if it says, no paid leave for anything except  
14 religion?

15 That's not a Title VII problem, probably, but  
16 how about a constitutional problem?

17 MR. ROSEN: We think that it depends how much  
18 paid leave they give for religion. We think there's  
19 room --

20 QUESTION: Well, they give three days paid  
21 leave for religion, but no paid leave for anything else.

22 MR. ROSEN: We think that the free exercise  
23 clause of the Constitution provides enough free play --  
24 and Title VII certainly does provide enough free play to  
25 make that kind; three days a year would be all right.

1 QUESTION: But would you think that Title VII  
2 would require that?

3 MR. ROSEN: No, no. No. We think that just  
4 as Title VII would not require this accommodation, an  
5 explicitly religious accommodation by the employer, as a  
6 general rule, so such an accommodation does not justify,  
7 cannot justify an explicitly religious line disfavoring  
8 religion with regard to personal leave provisions.

9 QUESTION: So you think you know enough  
10 about what personal leave is allowed for in this  
11 specific instance to say that it discriminates against  
12 religion?

13 MR. ROSEN: We have not cross-petitioned. We  
14 are here supporting a judgment which remanded this case  
15 for further findings about the scope of personal leave.  
16 In that sense, I can't tell you that I think that you  
17 should know. I think that what the record will show --

18 QUESTION: You don't object to the remand?

19 MR. ROSEN: We don't object to the remand. We  
20 did not cross-petition.

21 QUESTION: I'm not clear about your position.  
22 Suppose there were 18 days for a listed number of  
23 nonreligious reasons. No days of paid leave for any  
24 religious reason whatever.

25 That would be all right in your view?

1 MR. ROSEN: As the government points out in  
2 its brief, that would be a somewhat different and a more  
3 difficult case. Because then there would be questions  
4 of comparability of treating specific secular reasons  
5 different from a specific religious reason. So that  
6 might be --

7 QUESTION: You're undecided on that?

8 MR. ROSEN: I'm undecided on that.

9 QUESTION: What about if the 18 days were --  
10 in this case were expanded to 21 days; 21 days for  
11 explicit secular reasons, and 3 days for religious  
12 observance; that would be all right?

13 MR. ROSEN: For example, if on remand it were  
14 demonstrated, contrary to my expectation, that personal  
15 --

16 QUESTION: No, it's a new contract. It's a  
17 new contract.

18 MR. ROSEN: All right.

19 QUESTION: The three-day wildcard is gone.

20 MR. ROSEN: That would be all right.

21 QUESTION: And you get 21 days for explicit  
22 nonreligious reasons, and three days for religious  
23 reasons. That's all right?

24 MR. ROSEN: That would be all right.

25 QUESTION: How about one day for religious

1 reasons?

2 MR. ROSEN: Even that is probably all right.

3 QUESTION: Half a day?

4 MR. ROSEN: I think perhaps no days are all  
5 right. But that's the question on which I'm undecided.  
6 And a question which I think is really not presented on  
7 our view of this case, because whatever the employer may  
8 be required to do to accommodate religion does not  
9 defend an employer's subsequent or additional action, as  
10 here with regard to the personal leave days,  
11 discriminating against religious exercises.

12 QUESTION: Mr. Rosen, would you tell me again,  
13 because I'm not really sure I followed your argument,  
14 whether or not, and if not, why not, just striking the  
15 words, any religious observance, from that fourth  
16 exclusion would satisfy the facial attack, even though  
17 it would leave in effect the general exclusion of all  
18 other provisions covered by leave.

19 Tell me again on what that reason would be.

20 MR. ROSEN: My view on that is as with the  
21 chapel example that I used, it would still be an  
22 explicitly religious line. It would be that religion is  
23 not permitted -- because it is religion --

24 QUESTION: Because it is one of the 16  
25 exclusions.



1 MR. ROSEN: That is --

2 QUESTION: But that's still a specific  
3 religious line?

4 MR. ROSEN: That, I suggest, Justice Stevens,  
5 is presented as what is claimed to be a good reason to  
6 discriminate against religion, if you will. A good  
7 reason being, well, that religion is being limited --

8 QUESTION: Religion is like other things for  
9 which leave has already been provided; and that's  
10 discriminating against religion.

11 MR. ROSEN: Religion is --

12 QUESTION: You see, it seems to me possibly  
13 you could win the case and have that provision stricken,  
14 and you'd be right back where you started from. The  
15 contract would have precisely the same meaning, but  
16 would have deleted some language that you find  
17 offensive.

18 I just don't see how the general exclusion of  
19 all other leave already specifically provided for can be  
20 said to be a religiously -- facially discriminatory  
21 against religion. That's what I hang on.

22 MR. ROSEN: All right. The difference, as I  
23 see it, is that it's legitimate of the state or the  
24 employer to make any limits it wants on all these other  
25 categories without running afoul of religious

1 discrimination provisions in Title VII.

2 With regard to the religious discrimination  
3 provisions, however, the employer is limited even if --  
4 even if it has drawn the line which also applies to the  
5 other categories, it is still going along saying, no  
6 religion allowed.

7 This creates the same problems of excluding  
8 religion because it is religious; excluding activities  
9 which are identical because of their motivation;  
10 excluding Mr. Philbrook from using a religious holy day  
11 to observe or commemorate the death of a loved one,  
12 although his co-employee could take such a similar  
13 commemoration by going to a gravesite, so long as the  
14 form of commemoration was a nonreligious one.

15 So it still draws a line --

16 QUESTION: But it's acceptable to you so long  
17 -- or you think it may be acceptable to you, so long as  
18 they list all of the conceivable nonreligious purposes,  
19 and fail to list any religious purposes? That's all  
20 right. The only thing that sticks in your craw is if  
21 they say, provided no religious observance. As long as  
22 they just list nothing but secular observances, that's  
23 okay, or may be okay.

24 MR. ROSEN: The line I suggest would not be  
25 particularity, but comparability, Justice Scalia; that

1 if commemoration of the death of loved ones is  
2 permissible, and that commemoration takes the form of  
3 observance of a religious holy day, I would say that  
4 exclusion of the religious holy day is discriminatory.

5 QUESTION: I see.

6 MR. ROSEN: In sum, our view is that the line  
7 here is

8 QUESTION: Of course you'd say --

9 MR. ROSEN: Yes, Justice White.

10 QUESTION: -- anytime you permitted paid leave  
11 for a wedding, which is a church ceremony, in the sense  
12 that you aren't considered married unless you get  
13 married in the church, according to church ritual, if  
14 you allow that, you're really allowing -- shouldn't you  
15 also allow other leave for religious purposes?

16 MR. ROSEN: We think that the right line is  
17 all weddings -- if weddings are allowed, then you can't  
18 discriminate between secular weddings and religious  
19 weddings.

20 QUESTION: Yes, but how about other religious  
21 activities?

22 MR. ROSEN: I think it's all right for an  
23 employer to identify a specific purpose like a wedding.

24 CHIEF JUSTICE REHNQUIST: Your time has  
25 expired, Mr. Rosen.

1 We'll hear next from you, General Fried.

2 MR. ROSEN: Thank you.

3 ORAL ARGUMENT OF CHARLES FRIED, ESQ.,  
4 FOR THE UNITED STATES AND EEOC, AS AMICI CURIAE,  
5 IN SUPPORT OF RESPONDENTS.

6 MR. FRIED: Thank you, Mr. Chief Justice, and  
7 may it please the Court:

8 The United States appears here in a dual  
9 role. We are the principal enforcer of Title VII, and  
10 we are also the nation's largest employer subject to the  
11 strictures of Title VII.

12 So it's important for us to get it right, and  
13 to situate Title VII within the constitutional landscape  
14 of the two religion clauses.

15 The free exercise clause sets the floor on the  
16 matter. It's addressed to prohibitions, prohibitions on  
17 belief and exercise, and by extension, to discriminatory  
18 treatment -- discriminatory treatment of religion and  
19 religious exercise.

20 After that, we believe there is wide room for  
21 accommodation by government, as for instance, 5 U.S.C.  
22 550a, which deals with religious observance by federal  
23 employees. And also there's wide room for government to  
24 mandate accommodation by private parties before there is  
25 a bumping up against the ceiling of the establishment



1 clause.

2 The establishment clause involves  
3 entanglement, preference and the imposing of religion on  
4 the citizen by support.

5 But as Justice Marshall said in the Hardison  
6 case, accommodation is not establishment, even though  
7 the accommodation is not required by the free exercise  
8 clause.

9 Title VII, in our view, operates largely in  
10 that space between the floor and the ceiling. It  
11 repeats the floor obligation, government may not  
12 prohibit, government may not discriminate, in its  
13 treatment of religion.

14 But it extends it. It extends it to private  
15 employers; that already goes beyond the free exercise  
16 clause. And it extends it in another very important  
17 way, which may be implicated in this case, that is,  
18 where there is a disparate impact -- not disparate  
19 treatment but a disparate impact -- on religious  
20 observance, there is a duty to accommodate.

21 Now, we stay clear of the ceiling set by the  
22 Thorton case, because that duty is only a duty to  
23 accommodate reasonably, and it's limited in any event by  
24 undue hardship.

25 In this case, we have possibly a case of

1 straightforward discriminatory treatment because, and I  
2 think we need a remand to the District Court, and we  
3 support the judgment of the Court of Appeals for that  
4 reason, we need to know about this personal business  
5 leave, because if these personal days are in fact an  
6 almost wide open, take the time off if you like, or at  
7 least one day of it is, we consider, as does Mr. Rosen,  
8 that it would be offensive, that it would be  
9 discriminatory treatment for an employer to say, take  
10 the day off, do whatever you want, just don't pray; just  
11 don't go to church.

12 Do anything else. Just don't go to church.  
13 That is discriminatory treatment, and would, for that  
14 reason alone, violate Title VII.

15 QUESTION: What if it said -- what if it  
16 meant, do anything you want. Just don't use it as a day  
17 of observance for which we've given you three days under  
18 another provision?

19 MR. FRIED: That would be another, more  
20 difficult case. But we do have -- we do have the  
21 specific language which says you got three days for  
22 mandated religious observance. And then they go into a  
23 good bit of detail.

24 And then it's excluded, however, for any  
25 religious activity. So the exclusion is much wider.

1           QUESTION: Well, it isn't. Because the  
2 category from which you're excluding is necessary  
3 personal business. When you exclude religious  
4 observance as a subcategory of necessary personal  
5 business, you're excluding necessary religious  
6 observance.

7           Which seems to me to be the same thing as  
8 mandated religious observance.

9           MR. FRIED: I think with respect, Justice  
10 Scalia, that they do talk, at least in some versions of  
11 the collective bargaining agreement, and all versions  
12 are relevant, because we've got a back pay claim here,  
13 too, in some versions they spell out what they mean by  
14 mandated religious observance, and it talks about days  
15 required by the rules of the church.

16           Religious activity is not spelled out in that  
17 way, and might involve other activities other than the  
18 observance of a particular holy day

19           In any event --

20           QUESTION: Well, might that be another issue  
21 that it would be well to have clarified, if there is a  
22 remand?

23           MR. FRIED: Oh, no doubt. No doubt. And that  
24 is why we support a remand. Since there's an  
25 alternative reading of that provision, which would be

1 quite unexceptionable in terms of discriminatory  
2 treatment.

3 It may be that those three days are intended  
4 for quite narrow and nonrecurring events, things that  
5 don't come around every year, regular as clockwork, or  
6 regular as the calendar, and also which are not -- which  
7 are compelled by external compulsion.

8 In that event, if that is what we find on  
9 remand, then in our view there is no discriminatory  
10 treatment.

11 There may however be discriminatory impact.  
12 That is to say, as Philbrook has been claiming, that  
13 because of his particular religious needs, this  
14 provision bears on him in a more burdensome way than on  
15 other persons; those without those religious needs, or  
16 those with only three required religious holidays.

17 Now, as to discriminatory impact, it is our  
18 view that it is only there that the duty of reasonable  
19 accommodation comes in, and as to that duty, that is  
20 where we part company with the Court of Appeals, and in  
21 fact, join company with all the other Courts of Appeals  
22 which have considered this matter.

23 And in our view, once we're talking about  
24 reasonable accommodation, the only obligation that the  
25 employer has is to offer a reasonable accommodation. If



1 it has done that, he has satisfied his literal  
2 obligation under the statute. Nothing else is required.

3 And it seems to us that in a general way what  
4 we're talking about a few days a year, offering unpaid  
5 leave is a reasonable accommodation. It may not be the  
6 reasonable accommodation which an employee prefers. But  
7 it is nevertheless a reasonable accommodation, and  
8 discharges the obligation under the law.

9 I'm quick to say that if you have an employee  
10 for whom the problem arises not three times a year, but  
11 once a week, to say, well once a week you can take off  
12 without pay, that might become another matter.

13 Because at that point you are talking about an  
14 imposition on employment status. You are saying that  
15 this man has got to be paid 80 percent of his salary,  
16 rather than just missing a few days' pay.

17 And at that point, it may be that leave  
18 without pay is not a reasonable accommodation.

19 But in the context of this case, it is our  
20 view that leave without pay is a reasonable  
21 accommodation, and discharges the employer's obligation.

22 QUESTION: It may also be that there's no  
23 possible accommodation without an undue burden. I mean,  
24 if you're suggesting leave with pay, 52 days a year --

25 MR. FRIED: When an employer can show that

1 every reasonable accommodation nevertheless entails an  
2 undue burden, then this Court has held in the Hardison  
3 case, that's too bad, we regret it, but that's the end  
4 of the story. And the employee is not accommodated.

5 But this is all in disparate impact rather  
6 than in disparate treatment cases.

7 If there are no further questions, I thank the  
8 Court for its attention.

9 CHIEF JUSTICE REHNQUIST: Thank you, General  
10 Fried.

11 Mr. McWeeny, you have three minutes left --  
12 you have two minutes left.

13 REBUTTAL ARGUMENT OF ROBERT F. McWEENY, ESQ.,  
14 FOR RESPONDENT ANSONIA FEDERATION OF TEACHERS  
15 IN SUPPORT OF PETITIONERS I

16 MR. McWEENY: I would just like to emphasize  
17 that the necessary personal business leave I think is  
18 well documented in the record as to the limited use of  
19 it by the professional staff in Ansonia.

20 Also, there is absolutely no evidence that  
21 there has ever been a denial of necessary personal leave  
22 -- necessary personal business leave for anything other  
23 than religious observance.

24 If there's nothing that -- these hypothetical  
25 claims about work in the soup kitchen have not been

1 presented. And I think the evidence is that the policy  
2 is being interpreted and applied in a way that would not  
3 lead to that result.

4 And I think that's clear both on the -- it is  
5 not a general leave provision. It is personal business  
6 leave that cannot be scheduled at any other time.

7 And there is just no record of any evidence of  
8 a denial for any purpose other than for what leave is  
9 provided for, religious observance.

10 And Mr. Philbrook is being allowed all the  
11 days that he finds necessary to observe his religion,  
12 some with pay, and some without pay.

13 And I submit that perhaps there are lines, as  
14 the Solicitor General indicated, that have to be drawn  
15 in some of these situations.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 McWeeny.

18 The case is submitted.

19 (Whereupon, at 12:06 p.m., the case in the  
20 above-entitled matter was submitted.)  
21  
22  
23  
24  
25

**CERTIFICATION**

erson Reporting Company, Inc., hereby certifies that the  
ached pages represents an accurate transcription of  
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ame Court of The United States in the Matter of:

#85-495 - ANSONIA BOARD OF EDUCATION, ET AL., Petitioners V.

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RONALD PHILBROOK, ET AL.

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that these attached pages constitutes the original  
script of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



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