ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DARLENE WALTERS, Petitioner v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD BIEBER; AND EQUAL EMPLOYMENT OPORTUNITY COMMISSION...

CASE NO: 95-779 / 95-259

PLACE: Washington, D.C.

DATE: Wednesday, November 6, 1996

PAGES: 1-56

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

IN THE SUPREME COURT OF THE UNITED STATES

DARLENE WALTERS,	:	
Petitioner	:	
v.	:	No. 95-259
METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD BIEBER;	:	
and	:	CONSOLIDATED
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Petitioner	:	No. 95-779
v.	:	
METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD BIEBER	:	

Washington, D.C.

Wednesday, November 6, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

CONSTANTINE JOHN GEKAS, ESQ., Chicago, Illinois; on behalf

of the Petitioner Walters.

SETH P. WAXMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner EEOC.

PATRICK J. FALAHEE, JR., ESQ., Chicago, Illinois; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 95-259. Darlene Walters v. Metropolitan Educational Enterprises, and Equal Employment Opportunity Commission v. the same.

Mr. Gekas.

ORAL ARGUMENT OF CONSTANTINE JOHN GEKAS

ON BEHALF OF THE PETITIONER WALTERS

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

This case involves the construction of Section 701(b) of Title VII, which defines the term "employer" as follows: The term "employer," says the statute, means a person engaged in an industry affecting commerce, who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any -- any agent of such person.

We seek review of the holding of the Seventh Circuit in this case, which was that the words, "for each working day," can only be construed to have meaning under a test that counts employees only on the days that they are present at work or on the days that they are on paid leave, except for salaried employees. And for salaried employees, the Seventh Circuit said it makes no difference

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

where they are, what they're doing or how they're paid.

We believe that this is wrong for several reasons. First of all, because the plain text of the statute focuses on the ongoing employment relationship. Second of all, because the suggestion of the Seventh Circuit and all the other courts which have considered the -- the meaning of the phrase, "for each working day," they are wrong when they say that only this day-by-day method gives that phrase meaning. And, thirdly, because if the text is ambiguous -- and there is some suggestion, just because of the stark split in the courts on this, that perhaps the statute is ambiguous -- that the legislative history and the purpose intent of Congress, the policy underlying Title VII, and the EEOC's own administrative interpretation of the -- of the statute and those words favor the payroll method --

QUESTION: Mr. Waxman, what would be an example of the kind of a person -- the -- the kind of job they held -- who was counted under your view but not counted under the Seventy Circuit's view?

MR. GEKAS: Well, under our view, all employees who have an ongoing employment relationship would be counted. Under the Seventh Circuit's test, a part-time employee, for example, who works 4 days out of the week, but not the fifth day -- assuming a Monday to Friday

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

workweek -- would not be counted on a Friday. With this case, we have assumed ourselves past the problem of defining the term "workday" or "workweek," and we've basically focused on the question of whether or not there is a necessity to focus on whether or not someone's at work or not.

QUESTION: Well, what if the employee is -- shows up for work one day a month to do some accounting work and, therefore, is kept on the employer's so-called overall list of employees to do this stuff one day a month -- that's enough --

MR. GEKAS: Yes, it is, because the --

QUESTION: -- to count for the whole month?

MR. GEKAS: That's right. Because there's an ongoing employment relationship. We submit that it's --

QUESTION: Well, what if the person is listed, hasn't been taken off the computer base, but in fact hasn't done any work for, let's say, 4 months; do we count that person for the 4 months?

MR. GEKAS: Well, Your Honor, I think that that focuses on the question of whether or not, during the time that the person is not there, that person is an employee. There is a body of law, both from this Court -- Darden and Reid and the recent decision last year, NLRB against Town & Country, that sets forth a set of criteria having to do

with control.

And I would submit that, in that circumstance, where there's ambiguity because of some long period of time for which the employee is not present, that the courts would look really at the -- at the circumstance of the employee under those tests of employment control -- presence at work is one of them -- and it doesn't really present, in our view -- that hypothetical doesn't really present, in our view, the issue that's presented in this case.

QUESTION: But there are some questions?

MR. GEKAS: Yes, it's questions, but question --

QUESTION: Do you completely endorse the Department of Labor's regulations, adopting the payroll method for the Family Leave Act?

MR. GEKAS: Yes, we have, generally. Do we completely endorse -- endorse it?

QUESTION: Uh-huh.

MR. GEKAS: Yes, we do. We think that that's a very sensible application for a couple of reasons. It seems to us that it has to do, in part, to the deference issue that's presented by the court -- by this case, rather -- and it -- it -- one thing that the Department of Labor regulations do suggest and do show is that this is a reasonable interpretation.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

It's just not an interpretation that the E -- EEOC has come up with. It is one that the Department of Labor, on an independent statute, has come up with. It's one, indeed, that Congress, in subsequent legislation, has come up with. It is, indeed, one that half of the courts considering this issue have come up with. And so --

QUESTION: What does it -- what does it mean when the statute says that the EEOC -- it not only does not specifically confer rulemaking authority on the EEOC, but it specifically denies rulemaking authority to the EEOC? Isn't -- isn't that a reflection in the statute that the EEOC is not to be given the -- the authority to give content to the statute that most agencies possess?

MR. GEKAS: Well, clearly, under the case law, as I understand it, that is a distinction about the degree of deference that is given. It seems to me, in looking at this -- and Mr. Waxman, of course, can speak more authoritatively -- but looking at the question of the Court's last two or three decisions in the EEOC area about deference, Commercial Office Products -- and I think it's Gilbert -- General Electric against Gilbert in the ARAMCO case -- it seems to me that the deference issue for the EEOC is treated somewhat differently between Commercial Office Products on the one hand and ARAMCO and Gilbert on the other. And as Your Honor --

QUESTION: I said that first.

MR. GEKAS: Yes, you did, indeed.

(Laughter.)

MR. GEKAS: I was -- I was about to say --

(Laughter.)

MR. GEKAS: I was about to -- not claim authorship for that, but to attribute it to Your Honor's con -- concurrence in -- which case was it?

(Laughter.)

MR. GEKAS: And the point is I think that, whatever the test -- whatever the test is, whether it's the Commercial Office Products test or the Strickland test from the -- the 1940's, that the -- the issue -- the decision of the EEOC fares fairly well here, because -- and it doesn't -- the decision about deference doesn't have to turn on the question of the formality of rulemaking authority. Because if you go back to the more stringent test that the Court applies, the stringent -- the Strickland test --

QUESTION: Is it Strick -- are you saying Strickland or Skidmore?

QUESTION: Skidmore.

MR. GEKAS: Skidmore, that's right. Thank you, Your Honors. Skidmore, from the forties.

In that -- that case, the standard about

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

reasonableness and the validity of the reasoning, the power of the persuasive force, it seems to me, is enhanced by the fact that the Department of Labor has reached the same conclusion; Congress, in adopting a different statute, has reached the same conclusion --

QUESTION: Well, is that any different? I mean Skidmore -- Skidmore is, what, 1944 or something like that -- pre-Administrative Procedure Act. And -- and does it refer to -- when it talks of deference, does it mean anything other than the deference we would give to, for example, unanimity of opinion among respected academic commentators?

MR. GEKAS: Well, that's --

QUESTION: You know, Williston and Corbin, and if -- if -- you give certain deference to their views. Does it mean anything more than that?

MR. GEKAS: Well, that kind of detailed criteria is not contained in the more recent decisions on that. I would say that there is -- there -- there is some force, some rational force, to the EEOC's interpretation, whether or not --

QUESTION: Okay.

MR. GEKAS: -- whether or not --

QUESTION: You're talking about rational force and not authoritative effect, which is what Chevron talks

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

about?

MR. GEKAS: Well, I'm saying -- I'm saying that if the -- if the test is the Skidmore test, then it's -- this regulation satisfies it, because it has rational force, internally coherent, sensibly based on the statutory language. And there is also some unanimity of opinion -- perhaps not entirely unanimous, because of the Seventh Circuit and the other cases that go against it, but there is -- two-thirds of the people looking at this -- the Congress --

QUESTION: Mr. -- Mr. Gekas, may I interrupt just to ask if I understood your answer to Justice O'Connor correctly? You were saying that your interpretation -- let's forget about deference -- of this statute coincides in -- with that of the EEOC?

MR. GEKAS: Yes.

QUESTION: And then we got back -- but what you're saying is that, suppose there were no EEOC, that is the interpretation --

MR. GEKAS: Yes.

QUESTION: -- the one that they put forward --

MR. GEKAS: Yes.

QUESTION: -- is also the one that you put forward? But there's one thing that you also said in your response to Justice O'Connor that puzzled me, because I

thought both your interpretation and the EEOC's required that somebody be a current employee.

MR. GEKAS: Yes.

QUESTION: So someone -- the computer had to take their name off the payroll. I mean, one of the -- one of the things you said is you could be working for the company 10 years, you leave on a Friday, you're not counted that week?

MR. GEKAS: Yes. Well, the question of a former employee in the -- in the retaliation section is presented by the next case --

QUESTION: No, no, not -- not the retaliation. Whether -- whether you count somebody --

MR. GEKAS: Yes.

QUESTION: -- as working for that week --

MR. GEKAS: Yes.

QUESTION: -- when that person is discharged or quits on Thursday?

MR. GEKAS: Yes. Yes. Well, that's what we call the midweek employment change --

QUESTION: Yes.

MR. GEKAS: -- if I understand the focus of your question. And the midweek employment change is the one that we say gives meaning to the term, "for each working day," under the test that we advocate. The shorthand of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

it -- our test is called the payroll test. Really, what it focuses on is the existence of the employment relationship. And the words, "for each working day," have meaning if you do not count a person who, in the midweek, leaves the employment relationship. So, therefore, if an employee is on the payroll from -- and working in an employment relationship -- from Monday to Wednesday, and leaves --

QUESTION: Now -- now, I would like to ask what sense it would make to take your person who comes in once a month for one hour and say -- count that person, but not count the person who has worked, let's say, 10 hours a day for 4 days, but leaves the job permanently on the fifth day?

MR. GEKAS: Well, with any reasonable test, there are going to be hypotheticals, I think, perhaps more infrequent in practice than not, that suggest that, at the fringes, maybe the rule doesn't have intuitive sense. But there's a whole range of Federal statutes -- there's the tax statutes, the labor statute, OSHA statutes -- there's a whole range of -- of statutes that are designed to protect and include just such a person. A person who comes in once a month for 2 hours is -- is included under those statutes.

And so, as a matter of Federal scheme, there's

nothing untoward in this scheme, which is one designed to protect employees from discrimination.

QUESTION: But, more specifically, you're talking about the portion of the scheme that creates a small business exemption. Do you think it makes much sense to call a business a small business if it has 15 full-time employees who come in 5 days a week, but -- I'm sorry -- 14, who -- who come in 5 days a week, call it a small business, and therefore not covered by this; but if it has the same product, the same total amount of work, but, instead, has 28 people, each of whom do part-time work, and -- and come in only half a week, then it becomes a large business?

MR. GEKAS: Sure.

QUESTION: That doesn't seem to me to make much sense.

MR. GEKAS: Well, the reason for it is because Congress had to draw a line somewhere. The fact of the matter is the legislative history shows very clearly -- Senator Dirksen's colloquy with his colleagues shows very clearly what they wanted was a bright-line test, not just to avoid complications in handling these cases in the EEOC and in the judiciary --

QUESTION: Well, it certainly could be a bright-line test to say that the term, "for each working

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

day in each of 20 or more weeks," means just people who were there each working day. That's a bright-line test.

MR. GEKAS: If there's any experience from this case that we can gain, it is that that test, the working day test, is not a bright-line test. It was an agonizing experience for us to go through the process of trying to figure out who was present at work --

QUESTION: Well, it may have been difficult to calculate, but the rule was clear.

MR. GEKAS: Well --

QUESTION: You could determine each person for each working day, could you not?

MR. GEKAS: Well, when I say statement of -- of bright-line rule, I don't mean just one that can be easily stated and capsulized in a phrase. I mean one that can be easily stated, but also easily applied.

QUESTION: Well, that's a different rationale, ease of administration. And there, you could be right -- payroll plan is -- is easier. But I think that's a different rationale than a bright-line rule.

MR. GEKAS: Well, I suggest -- well, I suggest that, to the extent that the Senate debates focussed on ease of administration -- and they did to a great extent -- that's what I mean when I say "a bright-line test."

QUESTION: Under your proposed rule or

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

interpretation, I take it that an individual could be employed by three or four different employers?

MR. GEKAS: Absolutely correct. And the -- the case law under the various labor statutes says that someone can be an agent of different masters -- can be a servant of different masters. So there's nothing untoward about that.

To amplify a little bit on my answer to Your Honor, Justice O'Connor, it seems to me that it's important to realize that these two tests are not exclusive. The test that Mr. Falahee is going to advocate for the respondents includes the test that we say, because you have to be an employee, you have to be in an employment relationship to be counted for the purposes of -- for the purpose of his test.

You go on to determine whether or not someone is at work or on leave. Then you go on, again, to determine whether or not they are on paid leave. But it's an important analytical point to make here -- that our test is included in their test. We say essentially that you should stop for a variety of policy reasons and ease of administration, not just in the question of applying -- saving lawyers and magistrate judges and judges -- district court judges -- work --

QUESTION: Well, I am troubled, though, by what

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

we do with this language, "for each working day." I -- just reading it, without all of these other arguments, one would tend, I think, rather naturally, to think it means what it says.

MR. GEKAS: Well, the -- I guess our point is that you can't read, "for each working day," just in isolation from the rest of the statute. This statute says an employer who has 15 or more employees. And I think that the Government's brief, by the Solicitor General, in this case, for the EEOC, very clearly points out, with citations to appropriate references, that the word "has," in the context of the other words that are put together, necessarily implies the existence of an employment relationship.

QUESTION: Thank you, Mr. Gekas.

Mr. Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER EEOC

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

It is the Government's position that an employer is covered by Title VII when it has an ongoing employment relationship with 15 or more employees for each working day in each of 20 or more calendar weeks. We think that interpretation is correct for several reasons.

First, this interpretation, unlike the Seventh Circuit test, fully comports with the text, which states that an employer is a person, quote, who has 15 or more employees for each working day. It does not say, has 15 or more employees present for each working day, but if they're not present, count them if they are on paid leave, but not if they're on unpaid leave, unless they're salaried rather than hourly, in which case count them anyway.

QUESTION: What does -- what does the term "part-time employee" mean? Doesn't it suggest that you're -- you're not an employee full-time?

MR. WAXMAN: Well, I would -- I would think that that would be a tautology. It's not defined in the statute, but I --

QUESTION: But you -- you suggested that all employees are full-time employees, even if they're part-time employees.

MR. WAXMAN: Oh, to -- to the contrary, Justice Scalia. I would give you the example of -- for example, a -- a factory that employs 20 employees to work 2 hours a day, 6 days a week, that company is -- and Sunday is not a working day -- that company is covered by Title VII.

But if you take the same company, making the same product, and say, we're going to have the same 20

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

workers, but we, in order to meet increased production demand, we want them to work four 10-hour days, under the Seventh Circuit reading, that company would no longer be covered, because there would not be 15 or more employees on --

QUESTION: You -- you -- you can produce absurd results under either theory; will -- will you concede that?

MR. WAXMAN: I will --

QUESTION: Either theory will produce some?

MR. WAXMAN: I will concede, because even the devil can quote Scripture. You can produce absurd results under either theory. But my point -- and I hope I can make it here -- is that one of the central problems with the Seventh Circuit test is that it produces bizarre results even when applied to common employment situations, not just the absurd situations.

Let me give you another example. A business employs 20 -- retail business -- it employs 25 people. It's open 5 days a week, downtown Washington, D.C. Business is good. The owner decides he wants to open on Saturdays. But because it's downtown, what he does is he asks half the employees to come in on Saturday one week, and the other half to come in on the other Saturday. Under the Seventh Circuit test, that business, thereby,

ipso facto, removes itself from the coverage after Title VII. Because on the sixth working day, there are not 15 hourly employees present.

Or consider the example that this very Court considered in the Skidmore case, which was previously mentioned. In Skidmore, there was a factory worker who was required, on some of his days off, to remain on or near the factory, on call, unpaid, in order to be available in the event of a fire emergency. He was not paid unless there was an emergency, but he was required to stay in the factory or within a few minutes of it.

Does this man somehow cease to be an employee when he is on call? Plainly, his employment relationship continues for that day. But under the Respondent's test, he would, ipso facto, not be counted because he was not at work and he was not paid.

QUESTION: But under your test, a person who is hired to come in one day a month and do some special accounting work is an employee for every day of the month, I gather?

MR. WAXMAN: Well, I'm -- I'm with you part of the way, Justice O'Connor. Under our -- let me respond. Under our test, you have to look at every working day for each calendar week, in 20 weeks, and look at the number of employees that that employer has. Now, assuming the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

person comes in on a Monday and is working, if that person is not an independent contractor, that person counts as one. If the person doesn't come in for the rest of the week, but has an employment --

QUESTION: -- the rest of the month.

MR. WAXMAN: Or the rest of the month -- but has a employment relationship such that his job responsibilities, as an employee -- he's not an independent contractor, he's an employee who works 1 day a month -- the answer is yes, he is an employee for the rest of those periods of time if, applying the traditional standards that this Court applied in NLRB v. Town & Country, and Nationwide Insurance v. Darden, an employment relationship exists.

And I think, actually, your example points out not an anomaly in our reading, but a reason why our reading of the statute is really quite compelled. If I can just pick up on your example and expand it, that type of a situation would probably relate most often, for example, in a -- a catering business, where the caterer caters small jobs and large banquets. Some days the caterer needs only three people to help. Some days the caterer needs a hundred people to help.

And the caterer has a group of 80 people who ordinary -- who understand that when there's work, they

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

will work for the caterer. There may not be work every day. And, even when there's work, the caterer can decide who gets called.

If it turns out that there is a 20-year black employee of that company who comes in and makes a complaint, saying, look, I have worked at this company longer than anybody else. I have more seniority and experience than anybody else. But on all the -- the only times I ever get called is when there is nobody else available. Shouldn't that person, under -- could Title VII possibly mean that that person would not have a bona fide employment discrimination claim?

What Congress was intent --

QUESTION: But someone could be an employee -- a part-time employee is an employee for purposes of bringing a Title VII complaint. That doesn't mean that that person is an employee for the 15-person count. You yourself have said strongly, in your brief, that the word "employee" can mean different things in different contexts. And so, of course, the answer is yes to your, Is this person an employee for purposes of filing a discrimination charge? But the question is: Would such person be an employee for the purpose of the 15 --

MR. WAXMAN: Of the counting.

QUESTION: And on that question, I would like to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

ask you, on your reading, what purpose Congress could have had -- you say, Well, we do give meaning to this phrase, "for each working day." Our meaning is, if you work 10 years, but you leave employment on a Thursday, you're not counted that week. Or if you start on a Tuesday instead of a Monday, you're not counted. Why would Congress want to exclude those people?

MR. WAXMAN: I hope I can answer all these questions. First, let me say it is not --

QUESTION: That's the only question I asked.

MR. WAXMAN: It is not our position that if a person quits on Friday, that person isn't counted for the week. That person is counted for each working day in which he or she is employed. So, in calculating the number of people who are employees for each day, that person would be counted Monday through Thursday, but not Friday. But the purpose -- if I understood your question, Justice Ginsburg -- the purpose is why would Congress have wanted to ascribe that kind of a meaning to the words "for each working day"?

QUESTION: What -- well, first, tell me what -- what meaning you give to those words --

MR. WAXMAN: We --

QUESTION: -- because you just gave me an answer that I thought --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. WAXMAN: Okay --

QUESTION: -- is counter to what you say in your brief.

MR. WAXMAN: We, like the Respondents, give the same meaning to that word, which means that, in determining whether there are 15 -- the issue is 15 what? -- in determining whether there are 15, you need to look on a day-by-day basis. If the business has 6 working days a week, you need to look, under our test, at whether for each of those days, the business had an employment relationship with 15 or more people.

And the reason that Congress put that language into the statute, in the Dirksen-Mansfield amendment in the Senate, was stated by Senator Dirksen during the course of the legislative debates. And what he said is the purpose of adding the words, "for each working day on 20 or more calendar weeks in the present year or the preceding year," was to remove from coverage of Title VII seasonal workers. And --

QUESTION: Well, "weeks" alone would do that. You didn't -- you wouldn't have to say "for each working day."

MR. WAXMAN: Oh, no. But if you go -- if you go on and look at what Senator Dirksen said -- and it's cited at page 28 of our brief -- Senator Dirksen explained,

quote, the definition of employer was amended to provide a specific test of computing the number of employees of an employer.

In other words, if you just said you have to have 15 or more employees in 20 weeks, there are a number of different counting methods one might use in order to determine it. For example, you could say just add up the total number of people who did any work that week, however little, and use that. Or add up the total number of people that were employees on the beginning of the week.

What Congress said specifically was, We want to tell you how to count.

QUESTION: That's fine, but that difference would have nothing to do with seasonality versus nonseasonality.

MR. WAXMAN: Oh, I -- I --

QUESTION: The 20-week provision, by itself, takes care of the seasonal worker problem. And -- and "for each working day" just -- just decides, both for seasonal workers and nonseasonal workers, you know, how many people you're going to be counting. But I don't see how --

MR. WAXMAN: I --

QUESTION: -- "each working day" has anything to do with seasonality.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. WAXMAN: I -- I have to -- I have to respectfully disrespect -- disagree with you, Justice Scalia.

QUESTION: Yes, you do.

(Laughter.)

QUESTION: But tell -- tell me -- tell me why, though.

MR. WAXMAN: I respect you, and I disagree with you.

(Laughter.)

MR. WAXMAN: The question is, when Congress was dealing with the problem of seasonal workers, which the legislative history shows it was extremely concerned with, it was going to deal with it with -- with general language or with precise language. If it had just said if you have 15 or more work -- workers in 20 or more weeks, you're covered. But it went beyond that. It gave specific meaning to the way in which employers must count during those weeks. It is not one of the 20 weeks, unless for each working day of that week you have 15 or more employees.

QUESTION: Well, I guess my concern is --

MR. WAXMAN: It just applies an accounting method.

QUESTION: -- is how you read into it an

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

employment relationship for each such day, and you find an employment relationship even in situations where somebody isn't there for months, but stays on some convenient, little payroll, in case, sometime in the future, hauled in to be a substitute for something or other.

MR. WAXMAN: Well, in that instance, Your Honor, the Court would have to address the question of whether, in fact, that was an employee, applying whatever standard that this Court will announce in this case --

QUESTION: But applying your standard, it's an employee.

MR. WAXMAN: It may --

QUESTION: He's on that employer's list --

MR. WAXMAN: It may very well --

QUESTION: -- and might come back some day.

MR. WAXMAN: It may very well not be an employee. If it's somebody who works for me the first Tuesday of the summer, has no expectation of coming back on a particular day --

QUESTION: He expects to come back the first Tuesday of every summer, or at least occasionally during the year.

MR. WAXMAN: And my -- my response to you is that if an employer chooses to operate his business that way, that is, by using large numbers of intermittent

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

employees who come regularly but intermittently, that employer should --

QUESTION: Not large numbers. We're talking about an employer where the margin is 14 or 15, and when do we count. And it seems to me that your application of -- of when there's an employment relationship is a very loose one, indeed.

MR. WAXMAN: Well, I do think -- with respect to the 14 and 15, there has to be a line anywhere. But -- but my point is that the purpose of setting the number at 25 and then 15 -- and Congress also considered 8 -- had to do with preserving the intimate mom-and-pop business, and those intimate work environments in which everybody knows each other, and it's -- it would be wrong to impose upon them the scrutiny of Title VII.

If an employer chooses to conduct his business by using lots and lots of different people, thereby employing lots and lots of different relationships, Congress has decided that yes, that employer may not discriminate.

QUESTION: Mr. Waxman, may I take another example, which I take it might be a more common, seasonal practice? And that would be of -- of hiring, say, retired individuals to work for a month or two during agricultural -- picking apples, things like that. If -- if -- if an

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

individual -- let's say a retired individual -- is hired for a month every fall by his neighbor to pick apples and so on, and at the end of the month, the -- the two people say, okay -- one says, I'll be back in 11 month, and the other one says, I'll expect you September 1st, that's a -- I suppose that would be a classic example of the seasonal employee. And yet, on -- on your theory, I suppose there would be a continuing employment relationship.

MR. WAXMAN: There --

QUESTION: And -- and why wouldn't that run counter to what the Dirksen amendment was intended to do?

MR. WAXMAN: Well, this -- this employer -- there are a lot of plausible explanations. This employer, himself, during the other 11 months, may be employing 15 or more people working on his farm or doing any other thing. So the issue may not come up. But if the issue does come up --

QUESTION: Well, let's assume it does come up. Let's assume it does come up.

MR. WAXMAN: I --

QUESTION: It's -- it's another marginal case. That's a classic example of the seasonal employee, but, on your theory, he would be a -- a continuing employee.

MR. WAXMAN: If I were -- if -- I -- I think a very creditable argument could be made in that instance,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

if I were litigating a case, that because Congress meant to exclude seasonal businesses, there was not an employment relationship during the intervening 11 months.

QUESTION: Well, then -- then what is the distinction you're drawing between Justice O'Connor's once a month -- one day a month, and -- and the one month a year? Is it -- is it a concept of -- of seasonality as opposed to what, periodicity or something like that?

MR. WAXMAN: Yes, I think -- I think applying Federal law, construing the definition of employer as this Court will interpret it, this -- a -- a court -- or the EEOC would have to determine whether there was in fact a real, ongoing employment relationship. And many courts would say no in that instance.

QUESTION: Mr. Waxman --

QUESTION: In that regard, can you tell me, is the term "payroll" a fixed, stable, knowable, juridical term in tax law or in some other area of the law?

MR. WAXMAN: It --

QUESTION: We refer to the payroll method and the payroll. Is -- is there some very clear definition of what that is?

MR. WAXMAN: There is no -- to my knowledge, Justice Kennedy, there is no fixed method. And the word -- the use of the word "payroll" to describe our test is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

in fact really not very accurate. Our -- we look at the point --

QUESTION: I think you've answered the question, Mr. Waxman.

MR. WAXMAN: Thank you.

QUESTION: Mr. Falahee, we'll hear from you.

ORAL ARGUMENT OF PATRICK J. FALAHEE, JR.

ON BEHALF OF THE RESPONDENTS

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

The issue before this Court is whether Congress, back in 1964, intended to subject certain small businesses to Federal regulation under Title VII.

Congress had the authority to subject virtually all employers to that regulation, but Congress specifically chose not to do so. Congress chose to exclude small businesses by looking to the size of the business's work force. In other words, a small business was defined with respect to the number of employees it has working for each day. Nothing in the language of the statute, nothing in the legislative history, no canons of construction, nor principles of deference to administrative rulings or agency rulings, supports the Government's -- the EEOC's position.

Your Honors, I believe the accurate test to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

focus on here, once again, is the size of an employee's business. Congress chose to measure -- or the yardstick that Congress chose was the number of employees who were working for an employee, not the number --

QUESTION: Mr. Falahee, was -- was there any model for that? I mean, the -- the EEOC does point us to this Unemployment Compensation Act to support their way of counting. Was there any other statute before Title VII that said you're not -- you don't count as an employee unless you -- you are there every day of the workweek?

MR. FALAHEE: Your Honor, I'm not aware of any such -- of any such prior statute that Congress would have looked to. However, the phrase that's before this Court, "for each working day," curiously, does not appear anywhere on the Unemployment Compensation Act, as has been suggested or is -- is an unarticulated premise of the EEOC's argument.

QUESTION: Is there any similar exemption in the Fair Labor Standards Act of small business, 15 or more employers?

MR. FALAHEE: I'm aware of no -- no exemption that's similar to -- to this, Your Honor, no. No.

While it is clear that -- that Congress borrowed the 20-week -- it is clear that Congress borrowed the 20-week concept from the Unemployment Compensation Act,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

but the language in the Unemployment Compensation Act is markedly different from the language that ultimately found its way into Title VII.

QUESTION: Well, now, there is identical language now in the Family Leave Act, is there not?

MR. FALAHEE: Yes, Your Honor, there is.

QUESTION: And what is the result there? Are there specific regulations and so forth that make that clear?

MR. FALAHEE: Congress has --

QUESTION: The -- the payroll method is used, as it's called?

MR. FALAHEE: Congress has authorized the EEOC to promulgate regulations for purposes of the Family and Medical Leave Act. And pursuant to those regulations, Your Honor, the payroll method, as it's been described, is the method that the EEOC had advocated.

QUESTION: And that same construction, apparently, is going to apply in ADA and ADEA cases, as well?

MR. FALAHEE: Arguably it could. I believe the -- the distinction, however, between the Family and Medical Leave Act and between -- between the Family and Medical Leave Act and between Title VII, the case before this Court, is that, in Title VII, Congress specifically

declined to authorize the EEOC to promulgate any regulations other than procedural regulations.

QUESTION: But it is strange, is it not, that at the end of the day, you might end up with the payroll method used under the Family Leave Act, ADA, ADAEA, and a different one under Title VII. I -- I find that a little troublesome.

MR. FALAHEE: The possibility of arriving at inconsistent results does indeed exist. However, I believe that the focus in this case is to be on the definition of "for each" -- the definition of employee, and the phrase, "for each working day," in particular, in light of what Congress intended in 1964, not what Congress might have intended decades later, when the Family and Medical Leave Act was -- was adopted.

QUESTION: Do the Family Medical Leave Act regulations give a clear definition of what an employment relationship consists of?

MR. FALAHEE: I don't believe they do, Your Honor. I don't believe they do.

QUESTION: May I --

QUESTION: Of course, the -- the regulations under the Family and Medical Leave Act, if they are interpreting the very language that exists here, and if we were to interpret that language as meaning it -- it is not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the payroll plan, but it's the day-by-day system that you advocate, it may well be that the regulations under the Family and Medical Leave Act would exceed the agency's authority. It would just be unreasonable. I mean, if -- if there is in -- that inconsistency, what that inconsistency may -- may well prove is the invalidity of the regulations under the other Act, not the invalidity of your position under this Act.

MR. FALAHEE: I would -- I would agree with that, Your Honor.

QUESTION: I would think you would.

(Laughter.)

QUESTION: May I ask you --

QUESTION: But, Mr. Falahee, you -- you do recognize that there is at least some legislative history that some people might read that seems very heavily to support the -- what has been called the payroll method in connection with the Family Leave Act? I mean there's a blank for Title VII. We don't why they wrote those words. But for the Family Leave Act, we do have legislative history, don't we?

MR. FALAHEE: Yes, Your Honor --

QUESTION: On what those words -- at least some legislators -- thought they meant.

MR. FALAHEE: Yes. The legislative history of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

-- of Title VII is -- and in particular, the legislative history that relates to the phrase before this Court, "for each working day," is unusually sparse. The phrase, "for each working day," is nowhere specifically discussed -- nowhere that -- that I believe any of the parties have found -- is that phrase specifically discussed in connection with the legislative history of Title VII.

However, the later Congress -- 30 years later -- in enacting -- in enacting the Family and Medical Leave Act, did conduct what I -- I suspect would be a more -- could be described as a more comprehensive debate, or a more detailed discussion of what this terminology meant.

Unlike the Family -- unlike the Family and Medical Leave Act, there are no committee reports for Title VII. And those are the types of -- those are the types of sources that this Court has historically looked upon as the most compelling or the most persuasive legislative history. And the guides -- those guides, those precise guides that this Court has relied upon heavily in prior cases are absent in this case.

QUESTION: May -- may I ask you two questions that I'd just like to get your views on? Am I correct in understanding your position, that 15 employees don't have to be the same employees on each of the 15 -- each day of the working week, do they?

MR. FALAHEE: No, they do not, Your Honor.

QUESTION: You could have two sets of work force that -- one works two days and the other works 3 days, but on each of the days, they'll be 15, but they're a different 15 every --

MR. FALAHEE: Except -- except for -- where I would differ with -- with Your Honor on that is I think there can only be a single work force, not multiple work forces.

QUESTION: No -- but why not? Why not? Why couldn't you have two work forces, one of them work Monday and Tuesday and the other one works Wednesday, Thursday and Friday, and each of them has more than 15 people that work full time for the days they work? On each working day, the -- the statutory definition would be satisfied, would it not?

MR. FALAHEE: Yes, it would.

QUESTION: Okay.

MR. FALAHEE: Yes, it would. It --

MR. FALAHEE: It --

QUESTION: Then my second question is, is it not possible that the words, "for each working day," simply fulfill the function of deciding how long the workweek is? Because some workweeks are 5-day, some are 4, some are 6, and you have to know, for each working day in the week, in

order to determine how long the week is.

MR. FALAHEE: That would be a -- a permissible interpretation of the phrase, "for each working day."

QUESTION: And without that phrase in it, you wouldn't know whether the whole week had been covered or not? He can't say every day of the week, because people -- nobody works 7 days a week.

MR. FALAHEE: I -- I -- I don't believe there would be a way to determine that, Your Honor, no. To --

QUESTION: Well, it's been -- it's been argued, or suggested, that the payroll method is much easier to work with. I'm going to ask you if you agree with that, perhaps with an example.

If we were to adopt the payroll method, and an employer had an employee who worked a few weeks in July, and might or might not come back -- it was little bit un -- unclear -- does the employer tell the payroll department, Now push the delete button on the computer, and take this person's name off? Is it subject to some manipulation?

MR. FALAHEE: Well, I -- I believe Your -- Your Honor's question presents a hypothetical similar to the one suggested by -- by Justice O'Connor. I suppose, under that hypothetical set of facts, it would really determine -- or what would -- what would determine the outcome is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

whether the employer did call up his -- his payroll department or his automated payroll service and instruct the powers that be to remove John Smith or Jane Doe because they're no longer here.

QUESTION: Is there some clerical reason that people are kept on the payroll, because there's a certain amount of information, W-2 forms, et cetera, that it -- it's -- so it's just much easier to carry them forward than to keep putting them back on and taking them off every time?

MR. FALAHEE: Well, while -- while an -- an employer is required to maintain certain information for tax purposes, particularly to generate W-2 forms at the end of the year, I think the -- the answer to -- to Your Honor's question would really depend on what type of a payroll service was -- was being utilized. I think that could probably differ from case to case, depending upon -- upon the method of maintaining the payroll. And even with respect to an automated payroll system, I suggest that, depending on the way that system works, there could be different outcomes.

QUESTION: While -- while I have you, in connection with Justice Stevens's question -- because I was thinking of the same thing when the Solicitor General was arguing -- suppose you had an employer that worked a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

10-hour day, 4 days a week. Those -- and there were 15 employees on each of those days, and they were all the same employees -- they -- they would be covered under the Act, would they not?

MR. FALAHEE: Under -- under our approach, yes. Yes. Those employees --

QUESTION: Because, "for each working day," means that there are 4 working days, and they're there all -- for each working day?

MR. FALAHEE: Yes, Your Honor.

QUESTION: But they wouldn't be covered if -- if the -- if the business stayed open a fifth day and brought in only one employee, right? In fact, that'd be a very good way of making sure you're not covered; just keep the business open on Saturday and -- and have one employee come in, even for 1 hour on Saturday?

MR. FALAHEE: While the -- while the result is theoretically possible, I think the issue that --

QUESTION: It's very smart. I'd advise a client to do it --

(Laughter.)

QUESTION: -- theoretically possible.

MR. FALAHEE: I -- I -- I believe that the -- that the hypothetical Your Honor posits raises a somewhat different question. And that is, what is -- what is a

working day? Is -- is it a working day? In other words, is -- does a working day happen? Is there a working day when an employer does not conduct its full operations? And I believe there -- there have been some lower court cases recognizing that, in -- in -- in hypotheticals similar to Your Honor's, that fifth day would not be counted as a working day, to avoid precisely that result.

QUESTION: But, Mr. Falahee, I'm confused by your answer to Justice Kennedy's question, because I thought that it would be the other way on your method. That is, take someone's 5-day week -- regular 5-day week -- but this person works 10 hours a day, 4 days a week. I thought, under your method, that person would not count as an employee, because that person is -- is not employed for each working day?

MR. FALAHEE: No, Your Honor. Under -- under the -- under Justice Kennedy's hypothetical, the count would be 15 on Monday, Tuesday, Wednesday, and Thursday. And, apart from the -- the four -- from the working day issue, the issue of whether that fifth day is a working day, as Justice Scalia had -- has asked, that one individual who comes in on Friday would be -- would be counted.

QUESTION: Who doesn't come in on Friday.

QUESTION: But the -- the question that I have

is you have 15 every day for -- for 4 days. Most of them work 8 hours. But there's one person who works 10 hours, and so doesn't come in on the last day. So, on the last -- the fifth day, they're only 14 people. I thought, under your method, that employee -- employee -- that employer is not employing 15 or more people for each working day; am I wrong about that?

MR. FALAHEE: No. In -- in that particular week, in a case in which the 15th individual does not report for work on Friday, that individual --

QUESTION: So, in any week, somebody who comes in 4 days a week, 10 hours a day, is not counted as an employee for that week for this purpose?

MR. FALAHEE: That -- that individual would be counted for the days he or she worked.

QUESTION: Is -- but that individual would never be someone who has worked for each working day. So if you had that person the whole year -- just what I described -- 15 people, but one of them works 4 days a week, 10 hours a day, that employer would not come within Title VII, right?

MR. FALAHEE: That -- under that -- under that set of facts, carried forward for 52 weeks, that -- that person would not be considered an -- an employer for --

QUESTION: The employer would not be covered by Title VII, because it would not have 15 or more employees?

MR. FALAHEE: That is -- that is correct.

QUESTION: But that -- that's true unless --

QUESTION: I think you answered Justice Ginsburg differently from the way you answered me on whether they have to be the same employees.

QUESTION: That's right.

QUESTION: I thought you agreed with me, they don't have to be the same 15 -- you have a different 15 every day?

MR. FALAHEE: The same -- the same individual need not report each day to be considered an employee.

QUESTION: They're an employee on each day that he or she reports.

MR. FALAHEE: That's correct.

QUESTION: And they can be -- you can have 15 on Monday and an entirely different 15 on Tuesday and Wednesday and so forth and still come within the statute?

MR. FALAHEE: Yes.

QUESTION: Yeah, okay.

MR. FALAHEE: Yes.

QUESTION: But I think Justice Ginsburg was --

QUESTION: But my example was -- was --

QUESTION: -- assuming the contrary.

QUESTION: -- if on one day there are only 14, because the person who would be the 15th man works

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

overtime during the week in order to get the fifth day off. So I guess it's not the same as the -- the question that Justice Stevens was asking.

MR. FALAHEE: I --

QUESTION: You're telling me that an employer -- same number of hours, but somebody who works 4 days a week -- is never counted -- will never qualify that employer, whereas somebody who worked for that -- who -- who worked 2 hours a day each day a week, that employer would be under Title VII -- if I understand your method correctly -- is that right?

MR. FALAHEE: The focus is on counting the number of individuals, not the particular individuals.

QUESTION: Right. So, on -- on one day, if you have 14 workers --

MR. FALAHEE: Yes.

QUESTION: -- because you're missing the worker who was there 10 hours a day for 4 days --

MR. FALAHEE: Yes.

QUESTION: -- that's one employer. That employer is not covered?

MR. FALAHEE: That would be correct.

QUESTION: But, then, you have another employer who has the same 14 who show up for 8 hours a day, and then a 15th who comes in every day for 2 hours, that one

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

is covered?

MR. FALAHEE: That -- that -- under that scenario, the employer would be subject to Title VII, yes, Your Honor. Again, because the -- the focus -- the -- the -- the focus that -- that Congress had, in terms of measuring what is a small business, looked to the size of the employer's work force for each working day. And that work force could vary during -- during the course of the week.

QUESTION: Well, I guess --

QUESTION: Of course, the --

QUESTION: -- the main difference between you and the other side is what counts as an employment relationship on each day. And you say what counts is only presence that day. And they say no, if you have someone who is regularly here 2 hours a day for 4 days, that continues an employment relationship for counting purposes on the days they don't appear.

MR. FALAHEE: Your --

QUESTION: I mean, that seems to be the main difference, is what counts as an employment relationship.

MR. FALAHEE: Your Honor, our test does not focus upon the existence of an employment relationship whatsoever. The EEOC's test --

QUESTION: Well, you agree that's the main point

of difference between you?

MR. FALAHEE: As -- as to the focus, yes, Your Honor. Yes, Your Honor.

QUESTION: Well, except you don't really say "presence." That's not the -- the -- you would say "compensation," because you count salaried workers who get compensated for that day, whether they show up or not.

MR. FALAHEE: That's correct, Your Honor.

QUESTION: And you also -- you also count workers who are on paid vacation.

MR. FALAHEE: Yes, we do.

QUESTION: So it's really -- the -- the employer relationship you focus on is compensation for that day.

MR. FALAHEE: That's correct. That's correct.

QUESTION: I -- I wonder if you -- if you --

QUESTION: May I just add one question? Supposing you counted the days for purposes of counting the -- calculating a Christmas bonus, but that's the only thing it counts for, employee or not?

MR. FALAHEE: I'm not sure I understand the question, Your Honor.

QUESTION: Well, if it's compensation -- he doesn't show up at work on any Fridays, but in calculating eligibility for the Christmas bonus at the end of the year, they count all the days he was on the payroll.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. FALAHEE: Well, if the -- if the Christmas bonus test used the same language as Title VII, I believe we would have to apply the same test. I think -- I think it would really depend on what the -- what the language of the Christmas bonus policy was, Your Honor.

QUESTION: Well, the bonus was you -- you get a dollar a day for every day you're on the payroll, even though you didn't work certain days. Under your compensation test, it'd seem to me he'd be an employee. That's different from showing up at work, because you -- I think you agreed with Justice Scalia, your test is not presence, because you take people on sick leave and so forth. But if your test is compensation, it seems to me that any element of compensation that would accrue to a person on the payroll at the end of the year or for -- for any -- any benefit whatsoever, would make that person an employee.

MR. FALAHEE: No, Your Honor. No. The -- the -- the -- the concept of a -- of a Christmas bonus, as -- as I understand it, is -- is typically an extra check at the end of the year. That if -- if -- if that check is earned, if you will, I suspect, in one broader sense, it's earned pro rata for -- for a period of employment.

QUESTION: No; the only you have to do to earn it is be on the payroll. That's the point, see. And

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

there are -- there are arrangements like that, where you accrue so much vacation pay because of days on the payroll. I mean, you've -- you've agreed, I think, if you're paid for vacation, those days would count?

MR. FALAHEE: Yes, Your Honor.

QUESTION: And I don't know why, then days on which you accrue additional vacation pay, only because you're on the payroll, wouldn't also count.

MR. FALAHEE: Because --

QUESTION: Maybe there's a good reason, but I don't see it.

MR. FALAHEE: Because compensation, I believe, is a -- is a better measure of the employer's work force for each working day.

QUESTION: But that is -- but that is compensation. Why don't you give this one away? I mean --

(Laughter.)

QUESTION: -- if, indeed, the Christmas bonus is based on a day-by-day computation, and if you were there X number of days you get a higher bonus, you're being compensated for that day.

MR. FALAHEE: That would be correct, Your Honor.

QUESTION: And you would count -- you would count that, then?

QUESTION: Anyway, my point is you don't have to be there. You just have to be on the payroll?

QUESTION: That's right.

MR. FALAHEE: For purposes of a Christmas bonus, yes.

QUESTION: If it were done that way, and you were getting compensation for that Friday, even though you didn't come to work, you would have to count it under your system, as I understand it?

MR. FALAHEE: Under -- under our method, such an individual would be counted for that --

QUESTION: I mean, if there is such a crazy Christmas bonus system, then you count it.

MR. FALAHEE: Yes, Your Honor.

QUESTION: Suppose I can't answer this case by thinking of anomalies, because I can think of anomalies both sides. There's the Blue Light Catering Service, possibly cured by saying they're not employees when they're not there. There is the staggered workweek, possibly cured by saying sometimes it isn't really a workday. I get it both ways. Suppose that I can't answer it from the language. Suppose the legislative history seems fairly both ways or not clear.

Why wouldn't I just go with the EEOC on the ground that they're telling me this is administratively

easier? It tends to look administratively easier. And I'd assume, other things being equal, Congress would want to have the Court look at what the agency seems reasonably to say is administratively easier.

MR. FALAHEE: There -- there are several answers to that question, Your Honor. First of all, there is no indication from either the statutory language or from the legislative history of Title VII that Congress was concerned about writing a test that would necessarily be easy to implement. I think it's reasonable to assume, however, that Congress was concerned about writing a test that would be accurate, in terms of measuring the size of a small business.

And as this Court noted in Consumer Product Safety Commission against GTE, the fact that a particular interpretation might produce a result, or might -- might -- might produce a burdensome result is not sufficient to overcome an otherwise reasonable interpretation of the statute. The central difficulty with the EEOC's interpretation of -- of the definition in Section 701(b) is that it reads the phrase, "for each working day," completely out of the statute. Under the --

QUESTION: No, that's not right.

QUESTION: No --

QUESTION: Because you agreed it at least serves

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the purpose of defining the workweek. You need that language in there to differentiate between 4- and 5-day workweeks, and 6-day workweeks.

MR. FALAHEE: As -- as to that purpose, that would be a permissible purpose, Your Honor. But it would not have any bearing -- that phrase would have no bearing upon the issue before this Court.

QUESTION: Well, it would. I mean, they say they give full effect for each working day. Where the difference comes -- in defining who's employed each day. They say, We give full effect for each day. But someone who works part-time is going to be considered working each day. That's where the difference is.

MR. FALAHEE: I believe that the distinction really comes down to how we -- in -- in Your Honor's hypothetical -- comes down to how we define part-time. The phrase, "part-time," isn't used anywhere in the definition of employer. The language did come up. It was -- it was discussed in the legislative history. But there's no specific definition of the phrase -- of -- of the -- the language, "part-time."

QUESTION: But you include part-time people, too. And under your method, you can include a part-time person who works 1 hour a day, 5 days a work.

MR. FALAHEE: And that individual, Your Honor,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

would be counted for each of those 5 days. The question is not whether the individual is a quote, unquote, employee for --

QUESTION: Yeah, I understand that. But I'm thinking, here's a statute -- it can mean one thing, it can mean another thing. There's no legislative history to help. And there are these various ways. Returning to Justice Breyer's question, why don't you say Congress is regulating business; it's reasonable to think that they would pick the easiest and not the hardest way of counting?

MR. FALAHEE: One of the other difficulties, Your Honor, with -- with the principle of deference -- there -- there are several other problems --

QUESTION: Well, wholly apart from deference. If we got these ways -- and I'm ask -- which one would you pick? All other things being equal, I'd pick the one that's easiest for a business person to administer.

MR. FALAHEE: I --

QUESTION: And I think there's no contest on that. I mean, if you said, Well, it wasn't so much of a problem, but there was --

MR. FALAHEE: Well --

QUESTION: I think you're -- you're -- you're in trouble once you assume that "for each working day" has a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

substantial meaning apart from the one that you want to give it. And I'm surprised that you -- you conceded so quickly that -- that a -- a -- a valid purpose of it is to define the workweek. What difference does it make whether you're using a 3-day workweek or a 7-day workweek, if all you're looking at is the payroll?

Unless it's the -- you know, the negligible consequence of people who happen to come on or off at some point during the week, what -- why would the statute make no sense if it -- if it said 20 weeks and it meant calendar weeks? Wouldn't the statute be perfectly implemental -- implementable under a payroll system? Do you have to define what the workweek is if you're using a payroll system?

MR. FALAHEE: Under -- well, possibly, Your Honor. Possibly. Because --

QUESTION: Why?

MR. FALAHEE: Because there are -- there are any number of different payroll arrangements. A calendar week -- and Congress used the term, "calendar week," in this definition. I think that's fairly easily understood. A calendar week does not vary. However, pay periods could vary widely. Not every employer pays --

QUESTION: I'm not sure you understand my question. I just don't see why, if you're using a -- a

payroll system, it makes any difference whether the workweek is 3 -- is 3 or 7.

MR. FALAHEE: Under -- under --

QUESTION: The payroll is going to be there the whole week anyway, isn't it?

MR. FALAHEE: Under a weekly payroll system, yes, Your Honor. Yes, Your Honor. I -- I think -- I think what we're focusing, though -- what we're focusing on, though, here is a daily payroll, in terms of measuring the size of the employer's work force on a particular day.

QUESTION: Mr. -- Mr. Falahee, going back to Justice Ginsburg's question, let me put it this way. We -- we've got this problem, because of an amendment offered by Senator Dirksen. Do you think it's plausible to assume, if we're going to look to legislative history, that Senator Dirksen intended employers -- and the Government, for that matter, but particularly employers -- to have to go through the super-complicated calculation that your method would provide, as opposed to the much simpler method that the EEOC and your opposing counsel propose?

Does -- is Senator Dirksen the kind of person who wanted -- was he the kind of person who wanted to thrust that heavy obligation on employers?

MR. FALAHEE: There -- there are two points --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: -- Senator Dirksen --

(Laughter.)

QUESTION: He liked marigolds.

(Laughter.)

QUESTION: But you -- you know his record, don't you?

MR. FALAHEE: I -- I -- I am from Illinois, Your Honor.

(Laughter.)

MR. FALAHEE: However, I was only 3 --

QUESTION: It's in the legislative history there. You --

(Laughter.)

MR. FALAHEE: There -- there -- there are two points I'd like to make in -- in response to -- to Your Honor's question. First of all, the -- while the implementation of the daily method, at first blush, might appear to be burdensome, it's really not. First of all, we're only talking about, though, that small number of employers who are -- who are on the cusp.

QUESTION: Yeah, but we've got an example of what happens to them in this case, don't we? I mean, the discovery was gargantuan.

MR. FALAHEE: The discovery focused not entirely in this case, Your Honor, upon how to count individuals.

In fact, much of the discovery in this case, perhaps due to the Circuit split, was calculated to try to find or to identify other individuals out there who could potentially be counted as employees, thereby avoiding the counting problem. That was -- that was a -- a large part of the -- of the discovery.

QUESTION: Yeah, but isn't that going to be true in -- in any case that's close to the line?

MR. FALAHEE: In any case --

QUESTION: And in any case that's close to the line is, by definition, going to be the case of the comparatively small employer.

MR. FALAHEE: In -- in any such case, Your Honor, the -- the battleground, if you will, could -- could shift.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Falahee.

MR. FALAHEE: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DARLENE WALTERS, Petitioner v METROPOLITAN EDUCATIONAL ENTERPRISES, INC. ET AL.
CASE NO. 95-259/779

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

BY Ann Marie Federico

(REPORTER)