10-1976

Trans World Airlines, Inc. v. Hardison

Lewis F. Powell Jr.

SEP 2 7 1976

Court CA - 8 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 75-1385

Submitted ....., 19... Announced ....., 19... (Vide 75-1126)

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., Petitioners

vs.

LARRY G. HARDISON, ET AL.

3/29/76 - Cert.

Hold for Parker Seal

75-478

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Stevens, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Preliminary Memo

June 3, 1976 Conference
List 1, Sheet 2

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS		Timely (with extension)
v.		
HARDISON & TRANS WORLD AIRLINES, INC.	Cert to CA 8 (Lay, Bright and Webster) Federal/Civil	

Please see preliminary memo in No. 75-1126, Trans World Airlines, Inc. v. Hardison & International Association of Machinists, June 3, 1976 Conference (List 1, Sheet 2).

There is no response from either resp.

5/26/76	Nelson	WD Mo. and CA 8 Opinions in Petn.

ME

[c. OCT. 21, 1976]

This case was held for No. 75-478 - Parker Seal Co. v. Cummins

2. No. 75-1126 - Trans World Airlines, Inc. v. Hardison, et al. - Probable GRANT

Hardison was a TWA employee whose job was covered by a collective bargaining agreement with the International Association of Machinists. The agreement included seniority provisions related to days off and vacations. When Hardison began to study the teachings of the World-Wide Church of God, he discussed his need to have Saturdays off with the facility manager, who agreed to permit a "swapping" arrangement. Hardison then transferred to another shift to permit him to have Saturday off. Later, he bid for a position in another building since he desired a day shift position. This change cost him his relatively high seniority status and decreased his ability to select days off. He was, consequently, soon required to work on a Saturday. The manager and shop steward met with him in an attempt to reconcile the problem but Hardison did not report on three successive Saturdays. A discharge meeting was scheduled. The union advised him to ask for leniency but did not discuss waiver of the seniority rules. Hardison agreed to change to the "twilight shift" but, on the following Friday, left work before the end of that shift. At a discharge hearing, the union argued that the termination was too severe a penalty. However, Hardison was found insubordinate and discharged.

After exhausting administrative remedies, Hardison brought suit, alleging a violation of Title VII and a breach of the duty of fair representation on the part of the union.

The District Court entered judgment for all defendants on the ground that each had attempted a reasonable accommodation of Hardison's religious needs. The Eighth Circuit reversed as to TWA, concluding that TWA had not made reasonable efforts to accommodate Hardison and that the alternatives would not impose undue hardships on TWA. As to the union, the Court of Appeals found that, while a union might be liable in certain situations, it was not required to ignore the seniority system and had not breached its duty of fair representation. The Court rejected the Establishment Clause claim on the authority of Parker Seal.

If we are to take one of these cases, this is a good candidate for certiorari. I will vote to GRANT.

October 21, 1976

MEMORANDUM

75-1511
75-1105
75-1126

To: Mr. Justice Powell

From: Dave Martin

Re: Cert petitions held for Parker Seal

I'm inclined to Deny all three

Attached are the cert memoes in the three cases held for Parker Seal. None is ideal for considering the statutory construction and Establishment Clause issues. An ideal case, I suppose, would be one involving a continuing accommodation (e.g., every Saturday); one-shot accommodations probably require application of somewhat different standards. The ideal case would be one where the employee prevailed below, so that the employer in his petition clearly raises the Establishment Clause questions. And the facts would be relatively straightforward.

Deny

--unfortunately for our purposes--

Two of the cases went for the employer below: Williams v. Southern Union Gas Co., No. 75-1511; Reid v. Memphis Publishing Co., No. 75-1105. The Establishment Clause questions are not clearly presented. This need not be a terrific obstacle, however. Both cases require construction of the statute, and I cannot see how the Court can construe it without saying a good deal about the constitutional difficulties that loom in the background.

possible grant →

Reid involves a refusal to hire; Williams presents a firing. I would think the latter setting is better for considering the accommodation duty, but it may not make

since any alleged hardships are more concrete--less hypothetical--

much difference. Reid would have required accommodation to adjust for work nearly every Saturday of the year. Williams was more of a one-shot emergency where the employee was needed on one Sabbath day and he didn't show. But it seems that such emergencies might recur sporadically in the employer's business, so this factor does not greatly distinguish the cases.

The CA in Reid went very far in re-finding the facts in order to reverse a DC decision for the employee. The CA in Williams approved the DC's findings and holding for the employer. Reid may therefore afford a broader array of views below, making it a more attractive case.

The third case, Trans World Airlines, Inc. v. Hardison, No. 75-1126, went for the employee below, and the Establishment Clause issues are presented. Moreover, this case involves a collective bargaining contract, thereby affording an opportunity to decide what the statute requires in that setting. But as the pool memo indicates, this may not be a good case for deciding those issues. The fact situation is complex; the impact of the decision below is not entirely clear; and the problem demanding accommodation relates to a relatively short vacation period. Accommodation was not likely to be a continuing burden once the employee built up a little more seniority. I think it would be better to take one of the other two cases and eventually remand this for reconsideration in light of the decision in Reid or Williams. In the meantime we could hope that a cleaner and more straightforward collective bargaining case arrives.

As between Reid and Williams, I suppose I lean toward Reid, without much enthusiasm. We should remain alert for any other religious discrimination case that might come along presenting the questions in sharper focus. If Reid is granted, I suggest limiting the grant to the Title VII question. The attorney's fees question is probably not certworthy.

D.M.

SEP 2 7 1976

Court CA - 8 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 75-1126

Submitted ....., 19... Announced ....., 19...

TRANS WORLD AIRLINES, INC., Petitioner

vs.

LARRY G. HARDISON, ET AL.

2/9/76 - Cert.

No good case to take Hold for Parker Seal 75-478

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

Hold for

Parker Seal Co v Cummins
75-478 (Granted 3/1/76

Title VII + Establishment Clause issues.
Not a good case to grant on either issue. Facts rather unique.
(Accomodation to employee's religious beliefs)

Not a good test case for Parker Seal issue. Union is involved. Fact situation is complex, & VII only "accommodation" was for short vacation period

Preliminary Memo

June 3, 1976 Conference
List 1, Sheet 2

No. 75-1126

Hold for Parker Seal. Phil

TRANS WORLD AIRLINES, INC.		Timely
v.		
HARDISON & INTERNATIONAL ASSOCIATION OF MACHINISTS	Cert to CA 8 (Lay, Bright and Webster) Federal/Civil	

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS		Timely (with extension)
v.		
HARDISON & TRANS WORLD AIRLINES, INC.	Cert to CA 8 (Lay, Bright and Webster) Federal/Civil	

1. SUMMARY: The Title VII and Establishment Clause questions in this case are related to No. 75-478, Parker Seal Co. v. Cummins, cert. granted, March 1, 1976, with the additional issue -- not sharply presented -- whether reasonable accommodation of the employee's religious practices may include depriving senior union members of their seniority rights. 1/

2. FACTS & PROCEEDINGS: Hardison's job with TWA was covered by the collective bargaining agreement with the Union. The agreement included seniority provisions related to days off and vacations. Hardison worked in the Stores Department at Kansas City, a facility open around the clock. Initially, Hardison worked in Building #1 doing work essential to TWA operations, but not unique. In March 1968, Hardison began studying the teachings of the Worldwide Church of God, which requires its members to refrain from work on certain holidays as well as during its sundown Friday to sundown Saturday Sabbath. Hardison discussed this with the Stores' systems manager who notified a supervisor that he agreed to having the Steward seek to swap days off for Hardison, TO permitting Hardison to have excused time off on WWCG holidays (as long as he worked "Christian" holidays), and to having the supervisor find Hardison another job -- presumably with TWA.

1/ No. 75-1105, Reid v. Memphis Publishing Co., held for Parker Seal, also does not present the seniority rights question.

The supervisor soon notified the manager that he was not having much success in trying to resolve the problem. Hardison continued to work Friday evenings and Saturdays, some on voluntary overtime. In October, Hardison advised the manager he had transferred to the graveyard shift which would enable him to observe the Sabbath, and he would soon formally enter the WWCG; he furnished a list of WWCG holidays. In December 1968, Hardison bid for a position (on the basis of seniority) in Building #2, in order to obtain a day shift position; newly married, he thought this would be more compatible with married life. In doing this, Hardison, who had relatively high seniority in Building #1, became second most junior in Building #2, meaning his ability to select days off was diminished. In March 1969, the low man on the totem pole went on vacation; Hardison had to fill in. The manager and Steward met with Hardison to try to solve problems, but all adjustments ended with Hardison having to work Saturday, March 8; he did not show up for work (nor did he file a grievance, though he knew he could). Hardison also missed work on March 15 and 22. He was informed that a discharge meeting was scheduled; before the meeting he met with the Union and it was decided that Hardison's best course was to ask for leniency; waiver of union seniority rules to permit Hardison to work on a different shift was not discussed. Hardison did agree to change to the twilight (1500-2300) shift, but when he left work early Friday, March 28, this solution had proved as elusive as the rest.

At a March 31 discharge hearing before a TWA representative, the Union argued that termination was too severe a penalty, but Hardison was found insubordinate and discharged April 2. The Union tried to contact Hardison about follow-up action, but he was not responsive.

Hardison filed with EEOC, which deferred to the Missouri Commission on Human Rights. After exhausting administrative remedies, Hardison filed suit in WD Mo. (Oliver) under Title VII, 42 U.S.C. § 2000e-2; a breach of the duty of fair representation was also charged! After a bench trial on predominantly stipulated facts, the DC entered judgment for all defendants: each had attempted a reasonable accommodation of Hardison's religious needs as required by controlling statutes and guidelines and ~~that~~ undue hardships would have resulted from any greater efforts. The DC observed that it "was impressed with the men who were on the line handling the problem." It was important to the DC that Hardison's own transfer put TWA in a harder position; TWA could not simply give Hardison time off, because replacing him with those on duty would deprive other work areas of coverage and substitutes would have to be paid overtime. (On weekends, only one person had Hardison's job in Building #2.) The DC saw constitutional problems, if other employees' bargained-for employment rights were subordinated to Hardison's religious rights.

I can see it coming!

CA 8 reversed as to TWA, disagreeing with both conclusions of the DC: TWA had not made reasonable efforts to accommodate

Hardison and the rejected alternatives would not impose an undue hardship on TWA. (1) Permitting Hardison to work a 4-day week. He was willing, and that some other shop function might suffer was a mere inconvenience. Hardison would be available for part of the Friday twilight shift. (2) Overtime payment of others to replace Hardison was not an undue hardship; in this case at least the cost would have ended when the junior man returned from vacation. (3) Noting that this Court has not settled the relationship between reasonable accommodation and a bona fide seniority system, CA 8 concluded that any collective bargaining agreement with seniority provisions precluding reasonable accommodation is prima facie evidence of employer and union culpability under Title VII. But it did not reach the question, because there was no evidence that TWA or the Union had made any effort to secure a variance from the seniority system by which any senior member could bump the swapper out of the swap: i.e., TWA and the Union could not singly or jointly work the job exchange.

CA 8 affirmed as to the Union, though agreeing a Union could be liable in some situations. The DC found that the Union's duty to accommodate did not require it to ignore the seniority system; the DC also said no breach of DFR. Those conclusions were not challenged on appeal, and CA 8 reserved the question whether union refusal to modify employee seniority rights when there is no other means of accommodations can be

accomplished without undue hardship to the employer. CA 8 rejected the so-called Establishment Clause claim, affirming the DC on that score, and citing Parker Seal in CA 6.

3. CONTENTIONS & DISCUSSION: TWA contends basically that the hardship is undue here and displays numerous horribles; it ignores that this is factually just a vacation case. What to do when a junior -- the only junior -- employee goes on several weeks vacation? It is plain, of course, that CA 8's decision was not very careful in limiting this to the vacation situation; the DC was, on the other hand, more interested in good faith than the amount of hardship on TWA. That the petition is more sour grapes than meritorious is suggested by the following: "[T]he employer must incur grievances, morale and work scheduling problems and the extra cost of overtime replacements while the deviate employee is supposedly worshipping." TWA Petition 15. Nonetheless, this decision does involve accommodating uniform work rules to the Title VII religious discrimination provisions and it is not evident from CA 8's opinion that it has done anything more than say, "TWA is a big company, surely they can reasonably accommodate this man without undue hardship. And we can't imagine the union will toss up any obstacles; at least it hasn't." TWA also makes an Establishment Clause argument, and says this decision conflicts with other CAs; it does not, though with varying factual situations the decisions are not at dress right.

The Union's concern in its cross-petition is that the CA 8 judgment reversing as to TWA necessarily means that when called upon to do so by TWA the Union must waive or vary the seniority provisions of the collective bargaining agreement. The Union recognizes CA 8 did not directly hold this, since it had concluded that TWA had other alternatives to accommodate Hardison, but it is apprehensive that the assumption of the CA 8 opinion is that the Union may have to cave in on request. In its view, the issue is ripe because employees can refuse overtime work and TWA might not be able to accommodate Hardison within the confines of the agreement. Perhaps so, but the issue seems too incidentally presented to be taken now.

4. CONCLUSION: While taking some case with Parker Seal, ~~which~~ that would permit the Court to address the reasonable accommodation/undue hardship problem in the wider arena, including union seniority rights, would be desirable, this is not the case. Hardison's own voluntary transfer makes the case factually unattractive, as does the limited one-shot vacation nature of the accommodation that had to be made. In addition, although CA 8 had doubtless made statements which understandably distress both employer and union, its judgment simply does not present the problem in sharp enough focus for the Court to take the case in order to address the seniority rights problem -- as to which there is not yet a conflict.

This is a hold for Parker Seal.

There is a waiver from Hardison in No. 75-1126 and no response from the Union. Neither Hardison nor TWA has responded in No. 75-1385.

5/26/76 Nelson DC/CA Opinions in Petitions

ME

NOV 1 2 1976

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 75-1126

Submitted ....., *19*... *Announced* ....., *19*...

Heretofore held for No. 75-478, Parker Seal Co. v. Cummins

TRANS WORLD AIRLINES, INC.

vs.

HARDISON

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.		✓											
Rehnquist, J.			✓										
Powell, J.			pass										
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓											
Brennan, J.			✓										
Burger, Ch. J.		✓											

NOV 12 1976

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 75-1385

Submitted ....., *19*... *Announced* ....., *19*...

Heretofore held for No. 75-478, Parker Seal Co. v. Cummins

INTRN'L ASSOC. OF MACHINISTS & AEROSPACE WORKERS

vs.

HARDISON

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.	hold for 75-1126												
Rehnquist, J.		✓											
Powell, J.			abs.										
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓											
Brennan, J.			✓										
Burger, Ch. J.		✓											

BOBTAIL BENCH MEMO

To: Justice Powell Date: 3/28/77

From: Tyler Baker

Re: Trans World Airlines, Inc. v. Hardison, No. 75-1126

Although I have read the briefs in this case and looked behind them to some extent, I will largely defer to the magnum opus written by my Brother Martin over the summer in Parker Seal Co. v. Cummins, No. 75-478. (attached) I agree with his assessment that the constitutional question here is quite close. If anything, I am inclined to find more problems under the three-part test than he did. (1) Purpose: Senator Randolphs' comments reflect an undeniable intent to aid the religions hampered by their Sabbath observance. It is true, however, that this case falls under the 1967 Commission guidelines which were essentially incorporated into the statute, and there is no such damaging evidence with respect to the origin of those guidelines. (2) Effect: This is well covered in the existing memos. (3) Entanglement: I am more pessimistic about this problem than either you or Dave. When the word gets out that one can avoid Saturday work because of religious principles, I think that the number of people claiming those principles is likely to shoot up. The links to the religions may be very tenuous--some of these groups are linked together primarily by radio sermons, I think. In summary, I think that the problem of pretextual claims with the associated need to delve into the reality of the belief claimed may become very significant.

I agree that the key to the statute's validity is a narrow construction. The real question in this case is the extent to which an employer (and a union, although this is merely lurking in

the background, rather than being presented in this case) must modify neutral rules established by a collective bargaining agreement in order to accomplish the required degree of accommodation. In addition to arguing that the whole accommodation provision is unconstitutional, the union in its brief and reply brief makes quite a good argument that the Congress did not intend by this statute to require that employees' contractual rights protected by a neutral collective bargaining agreement be subordinated to the rights of individuals who have religious practices that are difficult to fit into the ordinary structure of American industry. This may be the approach to take in this case, because I tend to think that most accommodations that require ignoring neutral collective bargaining agreements go too far. The clearest example of this, I think, is the suggestion that TWA compel employees who would otherwise be protected by seniority from working on Saturdays to do so. Somehow, the suggestion that the collective bargaining agreement be modified to allow volunteers to swap on a temporary basis with resp is less offensive, although those persons who would use their seniority to take the swap in preference to resp are still having their rights subordinated to resp's.

Key point

It is possible that this case can be affirmed on its particular facts. At the time that the problem arose, resp was working on a shift that did not conflict with his Sabbath requirements. The problem resulted from his having to take over for a person on vacation, requiring Saturday work. Thus, there was reason to believe that the problem would only last for the length of time of the vacation. For a short period of time, TWA might be expected to fill in with a supervisor (although that leaves other areas understaffed) or to pay for overtime for a volunteer to cover for resp (assuming that such a volunteer could be found so that the collective bargaining

agreement would not be XX broken by having an employee compelled to work). If the extent of the accommodation were limited in time, it XXX might be acceptable. I do not think that such remedies would be appropriate if one were talking about the entire work year. Dave's memo questions the appropriateness of requiring overtime pay, but perhaps limited circumstances would XXX pass muster. The problem with the above analysis is that, before he was discharged, resp transferred to a twilight shift, andXXX his last act of defiance was leaving that shift at sundown on Friday. In that particular shift, the problem would XX occur every Friday, and my time-limited analysis would not work. The SG's analysis is premised on the XX limited time duration of the problem, although he also argues that seniority rules are no defense.

There are several faults that are imputed to TWA that might just be a function of the relationship between employer and union. TWA is faulted for its failure to seek volunteers within the seniority system. But apparently TWA did state that XXXX such swaps would be OK and left the matter with the XXX union steward. I imagine that the message would have been stronger if TWA had done more, but one does not have to be very imaginative to think of the problems with circumventing the ordinary channels of communication between company and union. TWA is also faulted for not taking resp's problem to the Union Relief Committee, which was empowered to make seniority adjustments in certain hardship cases. TWA states that it does not run that committee and that it was the role of the employee or XX his union to take the case there.

An important underlying issueX is whether an employer must XX try all possible alternatives or run the risk of XXX liability. This certainly is the view of the CA and of the SG, but as Dave points out in his memo, it really forces the employer to over-accommodate, espec-

when one takes into account the fact that the burden of proof is on the employer.

This is not a case like Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), where the modification of the seniority system is being done to remedy clear past discrimination. In this context I think that the language of §703(h), ostensibly protecting good faith seniority systems, must be given some effect.

TWA was not completely insensitive to the problems of resp. Its people devoted considerable time in seeking a resolution of those problems. Many of the suggestions of alternatives that should have been tried go too far. I think that one could say that TWA had not done enough, even in light of the above analysis, but the question is a close one.

75-1126 TWA v. HARDISON Argued 3/30/77

(Presents Q we left open in Parker Seal)

§ 701(j), passed in 1972 as a legislative adoption of an EEOC Reg., proscribes discrimination because of an individual's "religion". A duty is imposed on employer to "make reasonable accommodations to religious needs of employees ---- where [these] can be made w/out undue hardship". Burden is placed on employer to show "undue hardship".

§ 701(j) is attacked as violative the Establishment clause.

Under Three Part test: (Lemon, Nyquist)

(i) Purpose - is secular in view of purpose of Title VII to assure employment opportunities to minorities

(ii) Effect - close; may enhance or advance religion

(iii) Entanglement - Rough on Cts, but not manual entanglement.

But case is close on Const. issue. The statute is not an anti-discrimination measure. It apply only when all employees are treated alike.

Moreover, placing burden on employer is a reversal of normal Title VII Rule & can be unfair to employer & other employees

May be able to sustain statute by giving it a narrow & limited construction, enabling a Co. & Union to depend when the "cost to Co" of "discriminatees vs other employees" is at ~~a~~ significant ~~cost~~: modest additional cost; the "compelling" of other employees

Feldmiller (for TWA)

Argued facts primarily.

Ratner (for Union - Reh).

Argues that § 701(j) compels discrimination in favor of certain employees at expense of others.

Pickett (for Resh)

Then ~~a~~ in "sad" case. Resh. put her religion before her job.

TWA did nothing.

~~Pete~~ ~~Smith~~

Agrees that ~~Co. would have~~ in order to "accommodate" Resh as required by § 701(j) either Co. had to incur additional costs (e.g. give him overtime ??) or terms of bargaining agt. had to be disregarded.

~~Pete~~ & Steve asked this

Lewin (for american, Jewish Communism).

Orthdox Jew can't accept
employment requiring Saturday work.

Reverse 7-2

75-1126 TWA v. HARDISON Conf. 4/1/77

The Chief Justice Reverse

DC's findings are unavailable. Not not reach Const. Q. But if we reach it, would hold §701(j) invalid.

Mr. Justice Brennan Reverse as to Union
Affirm as to Company

Disagree with CA 8 only in it does not require Union to make accommodation.

Mr. Justice Stewart Reverse

Trouble seeing how Union is a proper party here.

Agree with CJ that DC was right.

Don't reach Const. Q - which is very close quest.

P.S. Agree with Stevens that Congress can't validly require an employer to pay more money (e.g. overtime) to accomodate.

Mr. Justice White Reverse

Decide case on "facts" —
D C had it about right

Mr. Justice Marshall Affirm as to Company
~~Union not.~~
Union not a party

Mr. Justice Blackmun Reverse

On facts.

Mr. Justice Powell Reverse

If we reach Const. Q, I would probably hold § 701(j) to be valid.

But we don't need to reach that issue.

Don't at all sure Union is before us.

On statutory issue, I think CA 8 erred in not accepting findings of D C. I think an adequate effort was made to accomodate

Mr. Justice Rehnquist Reverse

Decide case on facts. DC's findings are O.K. CA 8 erred in reversing on "clearly erroneous ground".

Mr. Justice Stevens Reverse

~~I~~ Incomprehensible not to be able to work out a "swap" but CA 8 did not decide case on that basis.

But Union not responsible here.

Thinks CA 8 was wrong on "4 day - 6 day" issue. It is always a hardship to compel employer to pay more money. This would be involved.

Agrees with W.J.B. that Union did not do enought to "accommodate".

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-17-77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–1126 AND 75–1385

Trans World Airlines, Inc., Petitioner,
75–1126 *v.*
Larry G. Hardison et al.

International Association of Machinists and Aerospace Workers, AFL–CIO, et al., Petitioners,
75–1385 *v.*
Larry G. Hardison et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Received
5/17
Circulated
10

[May —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 703 (a)(1) of the Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e–2 (a)(1), makes it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. At the time of the events involved here, a guideline of the Equal Employment Opportunity Commission (EEOC), 29 CFR § 1605.1 (b), required, as the Act itself now does, 42 U. S. C. § 2000e (j), that an employer, short of "undue hardship," make "reasonable accommodations" to the religious needs of its employees. The issue in this case is the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays.

I

We summarize briefly the facts found by the District Court. 375 F. Supp. 877 (WD Mo. 1974).

Petitioner Trans World Airlines (TWA) operates a large maintenance and overhaul base in Kansas City, Mo. On June 5, 1967, respondent Larry G. Hardison was hired by TWA to work as a clerk in the Stores Department at its Kansas City base. Because of its essential role in the Kansas City operation, the Stores Department must operate 24 hours per day, 365 days per year, and whenever an employee's job in that department is not filled, another employee must be shifted from another department, or a supervisor must cover the job, even if the work in other areas may suffer.

Hardison, like other employees at the Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement [1] that TWA maintains with petitioner International Association of Machinists and Aerospace Workers (IAM).[2] The seniority system is implemented by the union steward through a system of bidding by employees for particular shift assignments as they become available. The most senior employees have first choice for job and shift assignments as they become available, and the most junior employees are required to work when the union steward is unable to find enough people willing to work at a particular time or in a particular job to fill TWA's needs.

In the spring of 1968 Hardison began to study the religion

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[1] The TWA–IAM agreement provides in pertinent part:

"The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

. . . . . .

"Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department. . . ."

[2] TWA is the petitioner in No. 75–1126. Petitioners in No. 75–1385 are the international, local, and district levels of IAM, hereinafter collectively referred to as IAM or the union.

known as the Worldwide Church of God. One of the tenets of that religion is that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. The religion also proscribes work on certain specified religious holidays.

When Hardison informed Everett Kussman, the manager of the Stores Department, of his religious conviction regarding observance of the Sabbath, Kussman agreed that the union steward should seek a job swap for Hardison or a change of days off; that Hardison would have his religious holidays off whenever possible if Hardison agreed to work the traditional holidays when asked; and that Kussman would try to find Hardison another job that would be more compatible with his religious beliefs. The problem was temporarily solved when Hardison transferred to the 11 p. m.-7 a. m. shift. Working this shift permitted him to observe his Sabbath.

The problem soon reappeared when Hardison bid for and received a transfer from Building 1, where he had been employed, to Building 2, where he would work the day shift. The two buildings had entirely separate seniority lists; and while in Building 1 Hardison had sufficient seniority to observe the Sabbath regularly, he was second from the bottom on the Building 2 seniority list.

In Building 2 Hardison was asked to work Saturdays when a fellow employee went on vacation. TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargainging contract,[3] and Har-

[3] The union did have a Relief Committee organized to deal with the emergency problems of its members. The record reveals that in the past this committee had been instrumental in arranging for temporary adjustments in work schedules to meet the needs of union members; but the record also reveals that the Relief Committee had never arranged permanent changes in work assignments and that Hardison never sought the assistance of that committee.

dison had insufficient seniority to bid for a shift having Saturdays off.

A proposal that Hardison work only four days a week was rejected by the company. Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired Supply Shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

When an accommodation was not reached, Hardison refused to report for work on Saturdays. A transfer to the twilight shift proved unavailing since that schedule still required Hardison to work past sundown on Fridays. After a hearing, Hardison was discharged on grounds of insurbordination for refusing to work during his designated shift.

Hardison, having first invoked the administrative remedy provided by Title VII, brought this action for injunctive relief in the United States District Court against TWA and IAM, claiming that his discharge by TWA constituted religious discrimination in violation of Title VII, 42 U. S. C. § 2000e–2 (a)(1). He also charged that the union had discriminated against him by failing to represent him adequately in his dispute with TWA and by depriving him of his right to exercise his religious beliefs. Hardison's claim of religious discrimination rested on 1967 EEOC guidelines requiring employers "to make reasonable accommodations to the religious needs of employees" whenever such accommodation would not work an "undue hardship," 29 CFR § 1605.1, 32 Fed. Reg. 10298 (1967), and on similar language adopted by Congress in the 1972 amendments to Title VII, 42 U. S. C. § 2000e (j).

After a bench trial, the District Court ruled in favor of the defendants. Turning first to the claim against the union, the

District Court ruled that although the 1967 EEOC guidelines were applicable to unions, the union's duty to accommodate Hardison's belief did not require it to ignore its seniority system as Hardison appeared to claim.[4] As for Hardison's claim against TWA, the District Court rejected at the outset TWA's contention that requiring it in any way to accommodate the religious needs of its employees would constitute an unconstitutional establishment of religion. As the District Court construed the Act, however, TWA had satisfied its "reasonable accommodation" obligations, and any further accommodation would have worked an undue hardship on the company.

The Eighth Circuit Court of Appeals reversed the judgment for TWA. It agreed with the District Court's constitutional ruling, but held that TWA had not satisfied its duty to accommodate. Because it did not appear that Hardison had attacked directly the judgment of the union, the Court of Appeals affirmed that judgment without ruling on its substantive merits.

In separate petitions for certiorari TWA and IAM contended that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment of the Constitution. TWA also contended that the Court of Appeals improperly ignored the District Court's findings of fact.

We granted both petitions for certiorari. — U. S. — (1976). Because we agree with petitioners that their conduct

[4] The District Court voiced concern that if it did not find an undue hardship in such circumstances, accommodation of religious observances might impose "a priority of the religious over the secular" and thereby raise significant questions as to the constitutional validity of the statute under the Establishment Clause of the First Amendment. 375 F. Supp., at 883, quoting Edwards & Kaplan, Religious Discrimination and the Role of Aribitration Under Title VII, 69 Mich. L. Rev. 599, 628 (1971).

was not a violation of Title VII,[5] we need not reach the other questions presented.

II

The Court of Appeals found that TWA had committed an unlawful employment practice under § 703 (a)(1) of the Act, 42 U. S. C. § 2000e–2 (a)(1), which provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.[6] This is true regardless of whether

[5] Because the judgment in its favor was affirmed by the Court of Appeals, the union was a prevailing party below; and Hardison has not filed a petition for certiorari seeking to change that judgment. It may thus appear anomalous to have granted the union's petition for certiorari as well as that of TWA. But the union's view is that judgment below against TWA seriously involves union interests, because the rationale of the Court of Appeals' opinion, as the union understands it, "necessarily and explicitly assumes that petitioner Unions are legally obligated to waive or vary provisions of their collective bargaining agreement in order to accommodate respondent Hardison's beliefs, if called upon by TWA to do so." Union Petition, p. 2. This would appear to be the position of Hardison and the EEOC in this Court. Since we reverse the judgment against TWA, we need not pursue further the union's status in this Court.

[6] See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 278–279 (1976); *Franks* v. *Bowman Transportation Co., Inc.*, 424 U. S. 747, 763 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971).

From the outset, Congress has said that "[t]he purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial

the discrimination is directed against majorities or minorities. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 280 (1976). See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1973).

The prohibition against religious discrimination soon raised the question of whether it was impermissible under § 703 (a)(1) to discharge or refuse to hire a person who for religious reasons refused to work during the employer's normal workweek. In 1966 an EEOC guideline dealing with this problem declared that an employer had an obligation under the statute "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." 29 CFR § 1605.1, 31 Fed. Reg. 8370 (1966).

In 1967 the EEOC amended its guidelines to require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." 29 CFR § 1605.1, 32 Fed. Reg. 10298 (1967). The Commission did not suggest what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue." [7]

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procedures, discrimination in employment based on race, color, religion, or national origin." H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963). See 110 Cong. Rec. 13079–13080 (1964) (remarks of Sen. Clark). When Congress amended Title VII in 1972, it did not waiver from its principal goal. While Congressmen differed on the best methods to eliminate discrimination in employment, no one questioned the desirability of seeking that goal. Compare House R. Rep. No. 92-238, 1 Leg. Hist. 1 (June 2, 1971) (majority report of the Committee of the Whole House), with *id.*, at 58 (minority report).

[7] The EEOC expressed the view that "undue hardship . . . may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer," 29 CFR § 1605.1, 32 Fed. Reg. 10298 (1967). This single example was by no means intended to be exhaustive. In substance, the Commission left further definition of its guidelines to its

This question—the extent of the required accommodation—remained unsettled when this Court affirmed by an equally divided Court the Sixth Circuit's decision in *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (CA6 1970), aff'd by an equally divided Court, 402 U. S. 689 (1971). The discharge of an employee who for religious reasons had refused to work on Sundays was there held by the Court of Appeals not to be an unlawful employment pratice because the manner in which the employer allocated Sunday work assignments was discriminatory in neither its purpose nor effect; consistent with the 1967 EEOC guidelines, the employer had made a reasonable accommodation of the employee's beliefs by giving him the opportunity to secure a replacement for his Sunday work.[8]

In part "to resolve by legislation" some of the issues raised in *Dewey*, 118 Cong. Rec. 706 (1972) (remarks of Sen.

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review of "each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." *Ibid.* The Commission at that time did not purport to change the view expressed in its 1966 guidelines that work schedules generally applicable to all employees may not be unreasonable, even if they do not "operate with uniformity . . . upon the religious observances of [all] employees." The Commission's present view, expressed in an *amicus curiae* brief filed in support of Hardison and the Court of Appeals' judgment, is now otherwise, at least to some extent.

[8] Judgment entered by an equally divided Court is not "entitled to precedential weight," *Neil* v. *Biggers*, 409 U. S. 188, 192 (1972). Our ruling in *Dewey* thus does not resolve the questions there presented. Other factors, as well, make the impact of *Dewey* inconclusive. The conduct alleged to be an unlawful employment practice occurred prior to the promulgation of the 1967 guidelines, and the Court of Appeals expressed the view that those guidelines should not be given retroactive effect. Also, an earlier ruling by an arbitrator was held to have conclusively resolved the religious discrimination question in favor of the employer. But see *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). Finally, the employer in that case was not excused from a duty to accommodate; the Court of Appeals simply held that the employer had satified any obligation that it might have under the statute.

Randolph), Congress included the following definition of religion in its 1972 amendments to Title VII:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Title VII § 701 (j), 42 U. S. C. § 2000e (j). The intent and effect of this definition was to make it an unlawful employment practice under § 703 (a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees. But like the EEOC guidelines, the statute provides no guidance for determining the degree of accommodation that is required of an employer. The brief legislative history of § 701 (j) is likewise of little assistance in this regard.[9] The propo-

[9] Section 701 (j) was added to the 1972 amendments on the floor of the Senate. The legislative history of the measure consists chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record and consisting principally of the views of the proponent of the measure, Senator Jennings Randolph. 118 Cong. Rec. 705–706 (1972).

The Congressional Record also contains reprints of *Dewey* and *Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (MD Fla. 1971), rev'd, 464 F. 2d 1113 (CA5 1972), 118 Cong. Rec. 706–713 (1972), as well as a brief synopsis of the new provision, which makes reference to *Dewey*, 118 Cong. Rec. 7167 (1972). The significance of the legislative references to prior case law is unclear. In *Riley* the District Court ruled that an employer who discharged an employee for refusing to work on his Sabbath had not committed an unfair labor practice even though the employer had not made any effort whatsoever to accommodate the employee's religious needs. It is clear from the language of § 701 (j) that Congress intended to change this result by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation.

The reference to *Dewey* is even more opaque:

"The purpose of this subsection is to provide the statutory basis for

nent of the measure, Senator Jennings Randolph, expressed his general desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law," 18 Cong. Rec. 705 (1972), but he made no attempt to define the precise circumstances under which the "reasonable accommodation" requirement would be applied.[10]

In brief, the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but

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EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 325 (6th Cir. 1970), *Affirmed by an equally divided court*, 402 U. S. 689 (1971)." 118 Cong. Rec. 7167 (1972). Clearly, any suggestion in *Dewey* that an employer may not be required to make *reasonable* accommodation for the religious needs of its employees was disapproved by § 701 (j); but Congress did not indicate that "reasonable accommodation" requires an employer to do more than was done in *Dewey*, apparently preferring to leave that question open for future resolution by the EEOC. See also n. 8, *supra*.

[10] Cases decided by the courts of appeals since the enactment of the 1972 amendments to Title VII similarly provide us with little guidance as to the scope of the employer's obligation. In circumstances where an employer has declined to take steps that would burden some employees in order to permit another employee or prospective employee to observe his Sabbath, the Fifth, Sixth, and Tenth Circuits have found no violation for failure to accommodate. *Williams* v. *Southern Union Gas Co.*, 529 F. 2d 483 (CA10 1976); *Reid* v. *Memphis Publishing Co.*, 521 F. 2d 512 (CA6 1975), cert. denied, — U. S. — (1976), petition for rehearing pending; *Johnson* v. *United States Postal Service*, 497 F. 2d 128 (CA5 1974). But the Fifth and Sixth Circuits have also reached the opposite conclusion on similar facts. *Draper* v. *United States Pipe and Foundry Co.*, 527 F. 2d 515 (CA6 1975); *Cummins* v. *Parker Seal Co.*, 516 F. 2d 544 (CA6 1975), aff'd by an equally divided court, — U. S. — (1976); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113 (CA5 1972). These apparent intracircuit conflicts may be explainable on the basis of the differing facts of each case, but neither the Fifth nor the Sixth Circuit has suggested a theory of decision to justify the differing results that have been reached.

the reach of that obligation has never been spelled out by Congress or by Commission guidelines. With this in mind, we turn to a consideration of whether TWA has met its obligation under Title VII to accommodate the religious observances of its employees.

III

The Court of Appeals held that TWA had not made reasonable efforts to accommodate Hardison's religious needs under the 1967 EEOC guidelines in effect at the time the relevant events occurred.[11] In its view, TWA had rejected three reasonable alternatives, any one of which would have satisfied its obligation without undue hardship. First, within the framework of the seniority system, TWA could have permitted Hardison to work a four-day week, utilizing in his place a supervisor or another worker on duty elsewhere. That this would have caused other shop functions to suffer was insufficient to amount to undue hardship in the opinion of the Court of Appeals. Second—according to the Court of Appeals, also within the bounds of the collective-bargaining contract—the company could have filled Hardison's Saturday shift from other available personnel competent to do the job, of which the court said there were at least 200. That this would have involved premium overtime pay was not deemed

[11] Ordinarily, an EEOC guideline is not entitled to great weight, especially where, as here, it varies from prior EEOC policy and no new legislative history has been introduced in support of the change. *General Electric Co.* v. *Gilbert*, — U. S. —, ———, Slip op., at 14–19 (1976). But where "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U. S. 367, 381–382 (1969), the guideline is entitled to some deference, at least sufficient in this case to warrant our accepting the guideline as a defensible construction of the pre-1972 statute, *i. e.*, as imposing on TWA the duty of "reasonable accommodation" in the absence of "undue hardship." We thus need not consider whether § 701 (j) must be applied retroactively to the facts of this case.

an undue hardship. Third, TWA could have arranged a "swap between Hardison and another employee either for another shift or for the Sabbath days." In response to the assertion that this would have involved a breach of the seniority provisions of the contract, the court noted that it had not been settled in the courts whether the required statutory accommodation to religious needs stopped short of transgressing seniority rules, but found it unnecessary to decide the issue because, as the Court of Appeals saw the record, TWA had not sought, and the union had therefore not declined to entertain, a possible variance from the seniority provisions of the collective-bargaining agreement. The company had simply left the entire matter to the union steward who the Court of Appeals said "likewise did nothing."

We disagree with the Court of Appeals in all relevant respects. It is our view that TWA made reasonable efforts to accommodate and that each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines.

Holding

A

It might be inferred from the Court of Appeals' opinion and from the brief of the EEOC in this Court that TWA's efforts to accommodate were no more than negligible. The findings of the District Court, supported by the record, are to the contrary. In summarizing its more detailed findings, the District Court observed:

> "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff at which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure." 375 F. Supp., at 89.

It is also true that TWA itself attempted without success to find Hardison another job. The District Court's view was that TWA had done all that could reasonably be expected within the bounds of the seniority system.

The Court of Appeals observed, however, that the possibility of a variance from the seniority system was never really posed to the union. This is contrary to the District Court's findings and to the record. The District Court found that TWA agreed to permit the union's steward to seek a swap of shifts or days off but that "the steward reported that he was unable to work out scheduling changes and that he understood no one was willing to swap days with plaintiff." 375 F. Supp., at 888. Also, "[t]he seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift." *Id.*, at 884. As the record shows, Hardison himself testified that Kussman was willing, but the union was not, to work out a shift or job trade with another employee. App. 76–77.

We shall say more about the seniority system, but at this juncture it appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. As will become apparent, the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off. Additionally, recognizing that weekend work schedules are the least popular, the company made further accommodation by reducing its work force to a bare minimum on those days.

B

We are also convinced, contrary to the Court of Appeals, that TWA cannot be faulted for having failed itself to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison; and for TWA to have arranged unilater-

ally for a swap would have amounted to a breach of the collective-bargaining agreement.

(1)

Hardison and the EEOC insist that the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees. We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute,[12] but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. The issue is important and warrants some discussion.

Any employer who, like TWA, conducts an around-the-clock operation is presented with the choice of allocating work

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[12] "The Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U. S. 747, 778 (1976). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). In *Franks* we held that it was permissible to award retroactive seniority to victims of past discrimination in order to implement the strong congressional policy of making victims of discrimination whole. *Franks* is not dispositive of the present case since here there is no evidence of past discrimination that must be remedied. Not only is the "make-whole" policy not present in this case, but, as we shall see, the strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others.

schedules either in accordance with the preferences of its employees or by involuntary assignment. Insofar as the varying shift preferences of its employees complement each other, TWA could meet its manpower needs through voluntary work scheduling. In the present case, for example, Hardison's supervisor foresaw little difficulty in giving Hardison his religious holidays off since they fell on days that most other employees preferred to work, while Hardison was willing to work on the traditional holidays that most other employees preferred to have off.

Whenever there are not enough employees who choose to work a particular shift, however, some employees must be assigned to that shift even though it is not their first choice. Such was evidently the case with regard to Saturday work; even though TWA cut back its weekend work force to a skeleton crew, not enough employees chose those days off to staff the Stores Department through voluntary scheduling. In these circumstances, TWA and IAM agreed to give first preference to employees who had worked in a particular department the longest.

Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective-bargaining agreement.

It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off. Allocating the burdens of weekend work was a matter for collective bargaining. In considering criteria to govern this allocation, TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardi-

son and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. See p. ——, *supra.* Indeed, the foundation for Hardison's claim is that TWA and IAM engaged in religious discrimination in violation of § 703 (a)(1) when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

(2)

Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself. Section 703 (h) provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result

> of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

42 U. S. C. § 2000e–2 (h). "[T]he unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide senority system would not be unlawful under Title VII." *International Brotherhood of Teamsters* v. *United States*, — U. S. —, Slip op., at 25 (1977). See also *United Air Lines, Inc.* v. *Evans*, — U. S. — (1977). Section 703 (h) is "a definitional provision; as with other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U. S. 747, 758 (1976). Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system is discriminatory in its effect.

There has been no suggestion of discriminatory intent in this case. "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion." 375 F. Supp., at 883. The Court of Appeals' conclusion that TWA was not limited by the terms of its seniority system was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful employment practice even though no discriminatory purpose had been shown. That ruling is plainly inconsistent with the dictates of § 703 (h), both on its face and as interpreted in the recent decisions of this Court.[13]

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[13] *Franks* v. *Bowman Transportation Co., Inc.*, 424 U. S. 747 (1976), is not to the contrary. In *Franks* we held that "once an illegal discriminatory practice occurring after the effective date of the Act is proved," 424 U. S., at 762, § 703 (h) does not bar an award of retroactive seniority status to victims of that discriminatory practice. Here the suggested exception to the TWA–IAM seniority system would not be remedial; the

As we have said, TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations.

C

The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or as higher wages.

To require TWA to bear more than a *de minimus* cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off, the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would

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operation of the seniority system itself is said to violate Title VII. In such circumstances, § 703 (h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose. See *United Air Lines, Inc.* v. *Evans*, — U. S. —, —, Slip op. 6–7 (1977).

not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 18, 1977

75-1126 - TWA v. Hardison

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

May 18, 1977

No. 75-1126 TWA v. Hardison et al.

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

LFP/lab

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 18, 1977

Re: No. 75-1126, TWA v. Hardison

Dear Byron:

In due course, I will circulate a dissent.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 20, 1977

Re: No. 75-1126 - TWA v. Hardison

Dear Byron:

Please join me.

The allowance of costs will fall primarily to you as the author of the Court's opinion. I hope that you will see fit to disallow a portion -- perhaps even half -- of the cost of printing the Appendix. It seems to me -- and you will wish to check this -- that Judge Oliver's opinion, which is, as usual, fairly long, is printed twice. See Appendix pages 183 and 218. In addition, the Oliver opinion is printed in the TWA petition for cert and also in the union's petition for cert. The Court of Appeals opinion similarly is printed in the Appendix as well as in both of those petitions. Thus, we have a situation where the Appendix and briefs in the aggregate give us three printings of the opinion of the Court of Appeals and four printings of the District Court's opinion. In this day of high prices, I think this is too much. Even the Government follows the practice of not printing lower court opinions in the appendix when they have already appeared in the petition for cert. I make this suggestion earnestly for your serious consideration.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 20, 1977

Re: No. 75-1126 - TWA v. Hardison

Dear Byron:

I will await Thurgood's dissent in this case.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1977

Re: No. 75-1126 - TWA v. Hardison

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1977

RE: Nos. 75-1126 & 1385 TWA & International Association of Machinists, etc. et al. v. Hardison

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1977

Re: 75-1126 TWA v. Hardison
75-1385 International Association of Machinists & Aerospace Workers v. Hardison

Dear Byron:

I join.

Regards,

Mr. Justice White

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
			4/4/77					
Join BRW 6/7/77	Join TM 6/3/77	join BRW 5/19/77	1st draft 5/17/77 2nd draft 6/7/77	Will circulate dissent 5/18/77 Typed draft 6/2/77 2nd draft 6/10/77	join BRW 5/20/77	join BRW 5/18/77	Will await TM dissent 5/20/77 join BRW 6/3/77	join BRW 5/18/77

75-1126 TWA v. Hardison