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Constitutional Law: Freedom to Observe Religion Must Yield to Collective-bargaining Contract's Seniority System: Trans World Airline, Inc. v. Hardison

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Abstract

In June 1967, Larry Hardison was hired by Trans World Airlines to work at its vital, round-the-clock Stores Department at the Kansas City International Airport.

KEYWORDS: freedom, seniority, trans world

Constitutional Law: Freedom to Observe Religion Must Yield to Collective-bargaining Contract's Seniority System: Trans World Airlines, Inc. v. Hardison

In June 1967, Larry Hardison was hired by Trans World Airlines to work at its vital, round-the-clock Stores Department at the Kansas City International Airport. The job was covered by a seniority system in a collective-bargaining agreement maintained by TWA and a labor union.[1] In the spring of 1968, Hardison began to study a religion known as the Worldwide Church of God, which requires its members to refrain from working on certain designated holidays as well as on its Sabbath, sundown Fridays through sundown Saturdays. In December 1968, pursuant to his request to be assigned to a day shift, Hardison was transferred from Building 1 of the Stores Department (where he had seniority) to Building 2 (where he was number two from the bottom). Shortly thereafter, he was called to substitute for a vacationing fellow employee

1. Hardison's job was subject to a collective-bargaining contract maintained by TWA with three different unions: the International Association of Machinists and Aerospace Workers, the International Association of Machinists and Aerospace Workers, District 142, and the International Association of Machinists and Aerospace Workers, Local 1650, all of which were sued along with TWA. When the Court of Appeals for the Eighth Circuit reviewed the case, it noted that, in view of its holding, the unions could be referred to simply as "the union." Hardison v. Trans World Airlines, Inc., 527 F.2d 35 (8th Cir. 1975). Under the seniority system, a union steward, representing all the unions, accepted bids from employees for particular shift assignments as they became available. First choice for job and shift assignments was offered to the most senior employees, and the most junior employees were required to fill those positions and shifts that the union steward was unable to fill through the voluntary bidding method. The TWA-IAM agreement provided in 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.
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> • • • • •
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> Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department. . . .

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 67 & n.1 (1977).

whose working hours included Friday evenings and Saturdays, *i.e.*, Hardison's Sabbath.[2]

Because of his recent transfer to Building 2, Hardison lacked sufficient seniority to bid himself out of the substitution assignment. Subsequently, his superior at TWA informed the union steward that the company would be amenable to any trading of employee work schedules that the latter could work out within the framework of the seniority system,[3] provided that the accommodations did not call for payment of overtime wages or the undermanning of any TWA operations.[4] Eventually, Hardison was transferred to the twilight shift, but on his first Friday under that schedule he left work at sundown, thereby precipitating his discharge by TWA.[5]

After exhausting the administrative remedy provided by Title VII of the 1964 Civil Rights Act, Hardison sued for injunctive relief, claiming that his discharge constituted religious discrimination in violation of Title VII, 42 U.S.C. Sections 2000e-2(a) (1)[6] and 2000e(j)[7] and of the

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2. *Id.* at 68.

3. Although it would seem that a viable alternative would have been merely to reassign Hardison to Building 1 where he might have regained his seniority, such a solution was not available. The union, pointing to the seniority system, would not approve his early return because it would violate a rule in the agreement prohibiting transfers twice within six months. *Id.* at 95 n.11 (Marshall, J., dissenting).

4. *Id.* at 68-69. Justice Marshall, in his lengthy dissent, considered an important factor that goes to the heart of this solution-searching by TWA and the union: "[Hardison] lost the non-Sabbath shift when an employee junior to him went on vacation. The vacation was to last only two weeks, however, and the record does not explain why respondent did not regain his shift at the end of that time." *Id.* at 94 n.9 (Marshall, J., dissenting).

5. *Id.* at 69. Justice White, writing for the majority, questioned Hardison's failure to seek assistance of the Union Relief Committee which had dealt successfully in the past with scheduling problems. *Id.* at 68 n.3. Finally, Justice Marshall, in his dissent, also noted that TWA, the union, and Hardison had apparently not approached the Union Relief Committee to approve an exemption. *See* text accompanying notes 103-4, *infra*.

The Union Relief Committee should be distinguished from the union's grievance committee, which did become involved in the dispute. 375 F. Supp. 877, 884 (1974).

6. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1970), 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.

7. Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (1970), adopted by

1967 Equal Employment Opportunity guidelines.[8] The United States District Court ruled in favor of both the union and TWA.[9] The Court of Appeals for the Eighth Circuit affirmed the judgment for the union as Hardison had not attacked it on appeal, but reversed the judgment for TWA.[10] On certiorari,[11] the United States Supreme Court reversed the judgment against TWA and HELD that the company had satisfied the Act's reasonable accommodation duties; that further efforts to accommodate Hardison's beliefs would have resulted in "undue hardship" to TWA; and that an agreed-upon seniority system is not required to yield to accommodate religious practices.[12] By reaching this particular decision, the Court found that it had obviated the necessity of addressing TWA's constitutional challenge of Title VII based on the establishment of religion clause[13] and of pursuing further the union's status.[14] Thus, the only issue addressed by the Court was "the extent of the

Congress in its 1972 amendment to Title VII, provides:

> 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.

8. The 1967 Equal Employment Opportunity Commission guideline on religious discrimination provides:

> The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, 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 C.F.R. § 1605.1(b), 32 Fed. Reg. 10,298 (July 13, 1967).

9. 375 F. Supp. 877, 891 (W.D. Mo. 1974).

10. 527 F.2d 33 (8th Cir. 1975).

11. The Court granted both TWA's and the union's separate petitions for certiorari. Although the union prevailed in both of the lower federal courts, it nevertheless filed its own petition for certiorari, contending that if the court of appeals' ruling as to TWA were upheld, it might eventually be obligated to waive provisions in its collective-bargaining agreement. 432 U.S. at 70-71 n.5.

12. *Id.* at 77-79.

13. The first amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion. . . ." Both the district court and the court of appeals ruled against TWA's argument that Title VII's prescribed duty to accommodate an employee's religious beliefs is a violation of the establishment clause. 375 F. Supp. at 887; 527 F.2d at 44.

14. 432 U.S. at 70-71 & n.5.

employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays."[15]

In deciding the issue, the Court turned its attention to an examination of the statutory and administrative language of the Act and the guidelines which served as the basis of Hardison's claim. With regard to Section 703(a)(1) of the Act, which makes it an unlawful employment practice for an employer to discharge an employee because of his religion, the Court noted, in its opinion,[16] *McDonald v. Santa Fe Trail Transportation Co.,*[17] *Franks v. Bowman Transportation Co.,*[18] *McDonnell Douglas Corp. v. Green,*[19] and *Griggs v. Duke Power Co.,*[20]

15. *Id.* at 66.

16. *Id.* at 71 n.6.

17. 427 U.S. 273, 278-79 (1976). In *McDonald,* two white employees charged with misappropriating their employer's property were dismissed from their jobs while a black employee, charged with the same offense, was retained. The whites brought suit against both the employer and the union alleging that their discharge constituted discrimination on the basis of race. The Court held that Title VII and § 1981 prohibited racial discrimination in private employment against whites as well as against nonwhites.

18. 424 U.S. 747, 763 (1976). The Court undoubtedly relied heavily on the *Franks* dissenting opinions to support its decision in *Hardison.* Significantly, the dissenters in *Franks* help to comprise the majority in *Hardison,* and, conversely, Justice Brennan, who wrote for the majority in *Franks,* joins Justice Marshall in his dissent in the present case. In *Franks,* the lower federal court had held that several blacks had been discriminated against by an employer's hiring practices. When the case reached the Supreme Court, the sole issue was whether an award of retroactive seniority (as well as back pay) was an appropriate remedy to correct that past discrimination. Justice Brennan, writing for the majority, granted that relief, even though he recognized that to do so would implicate the seniority expectations of Bowman's other employees. Chief Justice Burger and Justice Powell, joined by Justice Rehnquist, in their dissenting opinions protested the inequity of permitting the retroactive seniority relief, charging that such a remedy placed an unfair burden on "innocent employees," and afforded "preferential" treatment to a minority of employees at the expense of the majority. Chief Justice Burger accused the majority of "robbing Peter to pay Paul." *Id.* at 781 (Burger, J., dissenting).

19. 411 U.S. 792, 800 (1973). The Court in *McDonnell* ruled that, while Title VII prohibits an employer from refusing to hire a qualified applicant because of his race, it does not prohibit rejection of that same applicant if he has previously engaged in deliberate, unlawful activity against the employer, and the employer's refusal to hire him is based upon his participation in that activity.

20. 401 U.S. 424, 429-30 (1971). In *Griggs,* the Court held that Title VII prohibits an employer from requiring a high school education or the passing of a standardized intelligence test as a condition of employment when neither standard relates significantly to job capability. Although the Duke Power Company's tests appeared neutral in terms of intent, they operated to disquafy black job applicants at a significantly higher rate than white applicants, and implemented the employer's longstanding practice of

as well as an excerpt from the Congressional Record.[21] These cases established that the main purpose of Title VII was to eliminate discrimination in employment and that "*similarly situated employees* are not to be treated differently solely because they differ with respect to race, color, religion, sex or national origin."[22] The Court underscored this declaration by stating: "This is true regardless of whether the discrimination is directed against *majorities* or minorities."[23] Central to the Court's concerns was that Title VII be applied equitably, taking into account the impact it could have on all parties that would be affected.

In considering the 1967 EEOC guideline that requires employers to "make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business,"[24] the Court first established the propriety of using the guideline in its determination of the issue. While administrative guidelines are not ordinarily entitled to great weight, the Court singled out this one noting that Congress, wishing to give the guideline force, ratified it by passing "positive legislation,"[25] *i.e.*, Section 701(j),[26] which adopted the specific language of the 1967 EEOC guideline. The Court pointed to the legislative history of the Act as evidence that Congress wanted to clear away doubts left by inconclusive case law.[27] Precisely because it had found sufficient legislative intent, the Court held that it would consider the guideline and Section 701(j) without considering "whether Section 701(j) [had to] be applied

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giving preference to whites. The Court condemned the tests, calling them "fair in form, but discriminatory in operation." *Id.* at 431.

21. "'[T]he purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.'" 432 U.S. at 71 n.6.

22. *Id.* at 71 (emphasis added).

23. *Id.* at 71-72 (emphasis added). In making this statement, the Court relied on the *McDonald* and the *Griggs* cases. Given the holding in *Hardison,* it would seem that the Court chose to overlook its *Griggs* ruling that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). However, the discriminatory device in *Griggs* was an intelligence examination which job applicants were required to pass and not the provisions of a collective-bargaining agreement.

24. 29 C.F.R. § 1605.1(b), 32 Fed. Reg. 10,298 (1967). *See* text accompanying note 8, *supra.*

25. 432 U.S. at 76 n.11.

26. *Id.* at 73-74.

27. *Id.* 73.

retroactively to the facts of this litigation."[28]

As the Court traced the applicable statutory and administrative language, and examined the supporting case law, it arrived with seeming consternation at what it saw as an inescapable conclusion: "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 the reach of that obligation has never been spelled out by Congress or by EEOC guidelines."[29] The Court noted that the Commission, in proposing its 1967 guideline, "did not suggest what sort of accommodations [were] 'reasonable' or when hardship to an employer becomes 'undue.'"[30]

When the Supreme Court affirmed, by an equally divided court, the Sixth Circuit's decision in *Dewey v. Reynolds Metals Co.*,[31] the question as to how far this accommodation should extend was left unanswered. The Court in *Dewey* affirmed the lower court's judgment because there had been a finding that the manner in which the employer allocated his Sunday work assignments was not discriminatory either in its purpose or in its effect.[32] Furthermore, consistent with the 1967 guidelines, the employer had fulfilled his duty to make reasonable

28. *Id.* at 76 n.11.

29. *Id.* at 75.

30. *Id.* at 72.

31. 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971). In this case, the employee, Dewey, was subject to the terms of a collective-bargaining agreement between his union and his employer. Under the agreement, employees were required to work overtime when scheduled, or, in the alternative, to secure a replacement for themselves. When he was assigned Sunday overtime, Dewey refused to work or to find a replacement, contending that either act would violate his religious convictions. Following his subsequent discharge, he brought an action against his employer, alleging religious discrimination under Title VII. The Sixth Circuit Court of Appeals held that the employee had wrongfully violated the non-discriminatory terms of the collective-bargaining agreement so that his subsequent discharge was permissible under Title VII.

32. 432 U.S. at 73. In a footnote to this observation, the Court in *Hardison* pointed out that regardless of what the *Dewey* decision stated, it must be disregarded because "[j]udgment entered by an equally divided court is not 'entitled to precedential weight,' Neil v. Biggers, 409 U.S. 188, 192 (1972)." 432 U.S. at 73 n.8. The impact of *Dewey* is inconclusive also because (1) the case "was decided prior to the addition by Congress to the Civil Rights Act of 1964 of § 701(j) (42 USCA § 2000e(j)); and (2) the Court held the 1966 EEOC version of 29 CFR § 1605.1 applicable, and that version of the regulation did not require an employer to make reasonable accommodation to the religious needs of its employees. . . ." Annot., 22 A.L.R. FED. 580, at 606 (1975).

accommodations when he provided that the employee was permitted to secure his own replacement.[33]

In its discussion of the 1972 amendments to Title VII embodied in Section 701(j), the Court lamented that, in neither the statute nor the ample legislative history[34] backing it, was any guidance given for determining the degree of accommodation required of an employer.[35]

Finally, case law appeared on both sides of the issue, providing no clear-cut theories of decision:

> 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. . . . But the Fifth and Sixth Circuits have also reached the opposite conclusion on similar facts.[36]

33. 432 U.S. at 73.

34. *Id.* at 74-75 n.9, which states:

> The Congressional Record . . . contains reprints of *Dewey* and *Riley v. Bendix Corp.*, . . . as well as a brief synopsis of the new provision [Section 701(j)], 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.
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> The reference to *Dewey* is even more opaque:
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> "The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals Company*, 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.

This interpretation of the legislative history is in sharp contrast to that of Justice Marshall in his dissent. *See* note 72, *infra*.

35. 432 U.S. at 74-75 & n.9.

36. *Id.* at 75 n.10. The cases in which no violation was found were: Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976) (employee's dismissal did not constitute religious discrimination by employer if he did not regularly ask employee to work on Saturday (employee's Sabbath) but only

After looking in vain for helpful rules of law, the Court focused on the facts of the case. It observed that the court of appeals felt that TWA had failed to seek reasonable accommodations short of undue hardship, because the company rejected three alternatives. Its refusal to permit Hardison to work only four days a week, utilizing an employee on duty elsewhere; its refusal to bring into work an employee not normally assigned to that shift as a Saturday substitute; and finally, its refusal to arrange a swap between another employee and Hardison, made TWA's conduct violative of the Act. The court of appeals further found that TWA had not sought, and the union had not entertained, the idea of a possible variance of the collective-bargaining agreement, and that both TWA and the union were relying on one another to find a solution, with the result that neither did anything.

The Supreme Court chose to "disagree with the Court of Appeals in all relevant respects."[37] In giving its reasons, it defined the limits to which an employer, bound by a collective-bargaining agreement containing a seniority system, must go to reasonably accommodate religious observances. The three above-mentioned alternatives were rejected: the first two would have worked an undue hardship on the company in the form of undermanning its operations or forcing the em-

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asked employee to work a particular Saturday in order to complete a critically important project); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976), *petition for rehearing denied*, 97 S. Ct. 2989 (1977) (employer's failure to hire not discriminatory where prospective employee, a newspaper copyreader, refused to work on Saturdays, his Sabbath, and where employer, a newspaper publisher, required a limited number of copyreaders, who are specialists, to be available for a six-day workweek); Johnson v. U.S. Postal Serv., 497 F.2d 128 (5th Cir. 1974) (small postal facility of limited manpower which had hired employee to work as "part-time flexible clerk" was justified in discharging employee who failed to show up for work on several Saturdays after making attempts to accommodate employee's religious practices by allowing him as many Saturdays off as possible and recommending his transfer to a larger postal facility). The opposite conclusion was reached in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 97 S. Ct. 342 (1976), *judgment vacated and case remanded to the court of appeals for further consideration in light of* TWA v. Hardison, 432 U.S. 63 (1977), 97 S. Ct. 2965 (1977) (employer held liable for religious discrimination under Title VII where he discharged employee in response to "mild and infrequent complaints" from fellow employees forced to substitute on employee's Sabbath); and Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972) (employee's discharge constituted religious discrimination under Title VII where employer admitted that he had made no effort to transfer employee to different shift, or to obtain a substitute and, furthermore, that no actual need for a substitute appeared during employee's Sabbath absences).

37. 432 U.S. at 77.

ployer to pay overtime to some employee;[38] the last, in which TWA would have unilaterally arranged a "swap," would have involved an impermissible breach of the seniority provisions of the contract.[39] TWA had sought to comply with the statutory requirements by holding several meetings, by accommodating Hardison's observance of his special religious holidays, by authorizing the union steward to search for someone who would be willing to swap shifts, and, finally, by attempting (without success) to find Hardison another job.[40] Furthermore, Hardison's superior at TWA, in meeting with the union's steward, had expressed his willingness in approving any possible job swaps, but the union official had stood firmly by the collective-bargaining contract and had been unwilling to work out a shift or job trade.[41] Thus, in the eyes of the Supreme Court, TWA had gone as far as it could. Regarding the collective-bargaining agreement that tied the employer's hands, the Court remarked: "[It] appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all TWA employees."[42] According to the Court's finding, TWA, by working within the framework of the seniority system, had found a neutral way to minimize the occasions during an employee's working life when he would be required to work on a day that he wanted to take off. Furthermore, TWA had reduced its weekend force to a bare minimum in order to complement that goal of the seniority system.[43]

Having concluded that the seniority system was itself a manifestation of reasonable accommodation, the Court rationalized its holding by listing strong public policy and equity arguments. It began by responding to a Hardison-EEOC contention that compliance with the statute took precedence over the collective-bargaining contract and the seniority rights of TWA's other employees. The Court agreed that case law indicated that neither a collective-bargaining agreement nor a seniority system could be used to violate the statute.[41] However, the Court felt that the case supporting that rule, *Franks v. Bowman*,[45] needed to be distinguished from the *Hardison* issue. In *Franks*, actual

38. *Id.* at 76.
39. *Id.* at 76-77.
40. *Id.* at 77.
41. *Id.* at 78.
42. *Id.*
43. *Id.*
44. *Id.* at 79.
45. 424 U.S. 747 (1976). *See also* note 18, *supra.*

past discrimination by the employer had already been found, and the Court had agreed to an abrogation of the seniority system only because it was necessary to "make whole" the victim of that past discrimination. The *Hardison* case was not subject to similar treatment because no discrimination had been found that needed to be corrected. Moreover, the Court had no intention of finding any discrimination in Hardison's case:[46] "[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement."[47] Thus, the Court, by simply refusing to find discrimination, successfully evaded the constraints of prior judicial rulings and, consequently, saved the TWA-IAM collective-bargaining agreement from alteration. Directing its attention to the strong public policy interest to be achieved by this interpretation, the Court stated:

> 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.[48]

In further support of seniority systems, the Court pointed out that an employer like TWA allocated work schedules either through involuntary assignments or through an equitable seniority system. In the opinion of the Court, to circumvent such a system would be to deny an innocent employee his contractual rights under the agreement. To favor Hardison's religious preferences would be to do so only "at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends"; another employee would have been deprived of his shift preference "at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[49] The Court summed it up by finding that

> 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 dis-

46. 432 U.S. at 79 n.12.
47. *Id.* at 79.
48. *Id.*
49. *Id.* at 81.

crimination is proscribed when it is directed against majorities as well as minorities.[50]

Finally, the Court supported its conclusion by observing that Section 703(h)[51] of the Act afforded special treatment for seniority systems. Citing *International Brotherhood of Teamsters v. U.S.*[52] and *United Airlines, Inc. v. Evans*,[53] the Court indicated that the statute signified

50. *Id.*

51. *Id.* The Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1970), 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. . . .

52. 431 U.S. 324 (1977). In this case, it was shown that an employer had violated Title VII by engaging in discriminatory hiring and promoting practices against black and Spanish-surnamed persons. Those who could show themselves to be victims of the company's discrimination after the passage of the Civil Rights Act were rewarded retroactive seniority relief, but victims of pre-Act discrimination were denied that remedy. In response to that denial, the pre-Act discriminatees alleged that the seniority system was unlawfully serving to perpetrate the effects of pre-Act discrimination and that the union's conduct in agreeing to and maintaining a seniority system violated the Civil Rights Act of 1968. The Court responded by referring to § 703(h) which, it held, reflected Congress' intent to immunize seniority systems from charges of that nature. Congress passed 703(h)

> to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. . . . [T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.. . . [A]n otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetrate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights even at the expense of pre-Act discriminatees.

431 U.S. at 352-54. The opinion further noted that under these circumstances the seniority system would be seen as discriminatory under Title VII if it could be shown that (1) its provisions did not apply equally to all races and ethnic groups or (2) it was formed and operated to perpetrate some illegal purpose. *Id.* at 355-56.

53. 431 U.S. 553 (1977). Evans was a female flight attendant who was discharged from United Air Lines in 1968 because she had married. She was rehired in 1972 subsequent to a judicial determination that such practice on the part of airlines was violative of Title VII. After the rehiring, she filed suit against United when she was treated for seniority purposes as though she had had no prior service with the company.

that routine application of a seniority system would not be regarded as unlawful.[54] After referring once again to *Franks,*[55] which held that Section 703(h) was a definitional provision and could therefore be relied upon to demonstrate which employment practices were discriminatory and which were not,[56] the Court declared: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."[57] Adopting this line of reasoning and finding that there had been "no suggestion of discriminatory intent"[58] on the part of either TWA or the union, the Court ruled that the employer had not discriminated against Hardison because of his religion.[59] The Court concluded by stating that, in the absence of what it considered to be clear statutory language and legislative history to the contrary, it would not construe Title VII to require an employer "to discriminate against some employees in order to enable others to observe their Sabbath."[60]

Believing that the majority's interpretation of the statute had actually nullified it, Mr. Justice Marshall, joined by Mr. Justice Brennan, filed a lengthy dissent, in which he wrote:

> Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really

In rejecting her Title VII claim, the Court pointed to its untimely filing and, significantly, to the fact that her attack on the seniority system as discriminatory was insufficiently drawn. Citing § 703(h), the Court stated:

> That section expressly provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system, provided that any disparity is not the result of intentional discrimination. Since respondent does not attack the bona fides of United's seniority system, and since she makes no charge that the system is intentionally designed to discriminate because of race, color, religion, sex, or national origin, § 703(h) provides an additional ground for rejecting her claim.

431 U.S. at 559-60.

54. 432 U.S. at 82.
55. 424 U.S. 747 (1976).
56. 432 U.S. at 82.
57. *Id.*
58. *Id.*
59. *Id.* at 83.
60. *Id.* at 85.

> mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.[61]

First, Marshall urged a common-sense reading of the statutory language by pointing out that an accommodation issue by its very definition arises only when some special interest must be allowed special consideration.[62] The typical pattern appearing in case law is one in which an employer's neutral rule of general applicability conflicts with a particular employee's religious practices. The issue is always whether the employee is to be exempted from the rule's demands.[63] To allow such an exemption, Marshall contended, is to allow its natural consequences, *i.e.*, "unequal" or "preferential" treatment for the individual involved and a privilege being "allocated according to religious beliefs."[64] Accordingly, Marshall found that the statute, by calling for "accommodations," demanded that Hardison be granted preferential treatment unless TWA could show that "'undue hardship' would result."[65]

Second, Marshall asserted that the Court seemed "almost oblivious to the legislative history of the 1972 amendment of Title VII."[66] He recounted that two employer-favoring decisions, *Dewey v. Reynolds Metal Co.*[67] and *Riley v. Bendix Corp.*,[68] rendered shortly after the promulgation of the 1967 EEOC guidelines,[69] questioned whether the guideline was consistent with Title VII.[70] Congress, in response to those questions and wishing to resolve the issue firmly in favor of an employee's viewpoint, tracked the language of the guideline and unanimously passed the 1972 amendment, *i.e.*, Section 2000e(j). Finding the

61. *Id.* at 86-87.
62. *Id.* at 87.
63. *Id.* at 87-88.
64. *Id.* at 88.
65. *Id.*
66. *Id.*
67. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court,* 402 U.S. 689 (1971).
68. 330 F. Supp. 583 (M.D. Fla. 1971).
69. *See* text accompanying note 8, *supra.*
70. 432 U.S. at 88.

language of the Court in *Hardison* to be "strikingly similar" to that in *Dewey*[71] (which Congress had specifically rejected in its 1972 amendment),[72] Marshall concluded that the Court had "follow[ed] the *Dewey* decision in direct contravention of congressional intent."[73]

Third, Marshall criticized the Court's treatment of TWA's contention that to require it to accommodate Hardison's religious needs would constitute an establishment of religion contrary to the first amendment of the Constitution. He noted that the Court, instead of responding to the Constitutional challenge, simply bypassed it by deciding the case in such a way as to nullify effectively the problem statute itself.[74] Marshall then proceeded to defend the constitutionality of Section 701(j) as applied to employment situations fitting the profile of Hardison's. First, he recognized that valid constitutional questions would be raised if the statute were interpreted to compel employers to incur substantial expenses to oblige religious observers;[75] conversely, if the expenditures were "*de minimis*" (as he found the $150 cost of accommodating Hardison's beliefs to be),[76] no constitutional argument could be valid.[77] Second, by

71. *Id.* at 89.

72. *Id.* Referring to both *Dewey* (*see* text accompanying notes 34-35, *supra*) and *Riley* (*see* text accompanying notes 34-35, *supra*), Marshall reviewed the legislative history supporting Section 2000e(j):

> These courts reasoned, in language strikingly similar to today's decision, that to excuse religious observers from neutral work rules would "discriminate against . . . other employees" and "constitute unequal administration of the collective-bargaining agreement." Dewey v. Reynolds Metal Co. [at 330]. They therefore refused to equate "religious discrimination with failure to accommodate." *Id.* at 335. When Congress was reviewing Title VII in 1972, Senator Jennings Randolph informed the Congress of these decisions which, he said, had "clouded" the meaning of religious discrimination. 118 Cong. Rec. 706 (1972). He introduced an amendment, tracking the language of the EEOC regulation, to make clear that Title VII requires religious accommodation, even though unequal treatment would result. The primary purpose of the amendment, he explained, was to protect Saturday Sabbatarians like himself from employers who refuse "to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.* at 705. His amendment was unanimously approved by the Senate on a roll call vote, *Id.*, at 731. . . .

This interpretation of the legislative history is in sharp contrast to that of Justice White, writing for the majority. *See* note 34, *supra.*

73. 432 U.S. at 89.

74. *Id.*

75. *Id.* at 90.

76. *Id.* at 92-93 n.6.

77. *Id.* at 90.

relying on *Wisconsin v. Yoder,*[78] *Sherbert v. Verner,*[79] *Zorach v. Clauson,*[80] *Gillette v. United States,*[81] *Welsh v. United States,*[82] *Braunfeld v. Brown,*[83] and *McGowan v. Maryland,*[84] Marshall demonstrated that the Court, on previous occasions, had failed to find establishment clause problems in exempting religious observers from state-imposed duties,[85] and contended, finally, that logic dictated a similar holding with regard to duties owed a private employer.[86]

Finally, Marshall narrowed his analysis to an examination of the facts and a determination of whether TWA had met its burden of exhausting all reasonable accommodations short of "undue hardship" to its business. He concluded that it had not.[87] He rejected the Court's conclusion that compelling the company to assume the costs of overtime pay or replacing Hardison during his Sabbath would have resulted in "undue hardship."[88] The record indicated that an accommodation

78. 406 U.S. 205, 234-35, n.22 (1972) (two Amish children, aged 14 and 15, who had completed eighth grade, were exempted from state compulsory school attendance law requiring all children to attend school until the age of 16).

79. 374 U.S. 398, 409 (1963) (Seventh-Day Adventist whose religion prohibited Saturday employment and who had rejected job offers for Saturday work was allowed to collect state unemployment compensation benefits even though state law regarding benefits explicitly rendered ineligible any person who failed to accept work offered to him).

80. 343 U.S. 306 (1952) (city program permitting public schools to release and excuse from class attendance certain students so that they could go to religious centers for religious instruction was found to be constitutional with regard to the establishment clause).

81. 401 U.S. 437 (1971) (section of Military Selective Service Act of 1967 which provided exemption from military service to conscientious objectors to *all* war was not violative of the establishment clause).

82. 398 U.S. 333, 343-44 (1970) (draft registrant who held "with the strength of more traditional religious convictions" strong beliefs opposing the taking of human life was exempted from military service).

83. 366 U.S. 599 (1961) (Sunday closing law proscribing Sunday retail sale of certain enumerated commodities upheld after Court rejected contention that the statute was law respecting establishment of religion and therefore violative of the first amendment).

84. 366 U.S. 420 (1961) (Frankfurter, J., concurring) (convictions of store employees who had made retail sales on a Sunday in violation of the state Sunday closing laws were upheld after the Court rejected the argument that the statute violated the establishment clause).

85. 432 U.S. at 90.

86. *Id.* at 91.

87. *Id.*

88. *Id.* at 92.

would have been necessary for a three-month period, at the end of which Hardison could have transferred back to his old building, where his seniority would have been reinstated.[89] The costs for an arrangement over that time period would have been $150,[90] a sum which Marshall, in contrast to the Court, found compatible with the purpose of the statute.

Marshall also took aim at TWA for its failure to seek out actively an employee who would have been willing to trade shifts with Hardison.[91] The reason for that failure was denounced by Marshall (although clearly accepted by the Court): any trade, whether voluntary or not, would have violated the collective-bargaining agreement which authorized only transfers to vacant jobs.[92] In addition to the possibility of a voluntary trade, Marshall proposed two other options that he believed would have satisfied the statutory requirements. The first was that TWA could have paid overtime to a voluntary replacement and passed on the cost to Hardison, who would earn it by working overtime at regular pay.[93] The second option would have called for TWA to transfer Hardison immediately back to his previous department in Building 1, where he had attained sufficient seniority.[94] Marshall fully recognized that both solutions would have abrogated the collective-bargaining contract: the first, because of a provision directing that any employee who worked overtime was to receive premium pay; and the second because the agreement prohibited employees from transferring more often than once every six months.[95] However, he inferred that the statute required resort to such options, arguing that neither of them would have deprived any other employee of his rights under the agreement or violated seniority expectations of others.[96] Furthermore, although he conceded that both solutions would cause some administrative inconvenience to TWA, he argued that such a burden would not make the statute violative of the establishment clause.[97] The Court, he stressed, on numerous previous occasions, had approved of exemptions from state-imposed duties that placed "not inconsiderable burdens on private parties."[98] Citing

89. *Id.* at 92-93 n.6.
90. *Id.*
91. *Id.* at 93-94.
92. *Id.* at 94 n.10.
93. *Id.* at 95.
94. *Id.*
95. *Id.* at 95-96.
96. *Id.*
97. *Id.* at 96 n.13.
98. *Id.*

Selective Draft Law Cases,[99] an old decision with recent implications, he attempted to buttress his argument that the statute did not violate the Constitution merely because it gave preferential treatment to Hardison. That case held that to excuse conscientious objectors (whose reasons for objecting were religious in nature) from military service during time of war forces non-objectors to serve in their place, but that such exemptions would in no way cause a violation of the establishment clause.[100] Certainly, Hardison's desire to be excused from work one day a week at the expense of his fellow employees could not, in Marshall's opinion, be as radical a proposal as being excused from combat duty at the expense of one's fellow citizens. Marshall also cited *Gallagher v. Crown Kosher Market,*[101] which upheld a law prohibiting private citizens from engaging in certain activities within fixed distances from places of worship, to support his contention that the law often discriminates against private parties to uphold special religious interests.[102]

One unpursued avenue of relief that Marshall mentioned, but surprisingly did not emphasize, was that TWA could have brought Hardison's problem before the Union Relief Committee after realizing that Hardison had made no attempt to do so himself.[103] Marshall noted that the record indicated that the function of the Committee was to alleviate problems caused by the seniority system, and that it had at least on one occasion arranged for a permanent transfer outside the seniority system.[104]

In his conclusion, Marshall called the decision a tragedy—not

99. 245 U.S. 366, 389 (1918).

100. *Id.* at 389-90.

101. 366 U.S. 617, 627 (1961).

102. 432 U.S. at 96 n.13. Although they seem impressive, these two cases do not supply the persuasive argument in favor of Hardison that Marshall hoped they would because the essential component that determined their outcome was lacking in Hardison's case. In Gillette v. United States, 401 U.S. 437 (1971), the Court indicated why it has respected the interests of conscientious objectors: it is for the "valid secular" reason that it is hopeless to try to transform such individuals into effective fighting men. *Id.* at 453. With regard to laws that restrict certain activities on Sundays, the *Gallagher* case revealed the judicial attitude by citing, at 630, McGowan v. Maryland, 366 U.S. 420, 450 (1961), which upheld Sunday closing laws because they serve the "legitimate secular interest" of the State, not to aid religion, but to provide one day a week for people to rest, recreate, and recuperate. In *Hardison,* there was a marked absence of a "valid secular" purpose behind § 701(j). It was the absence of such a purpose that led the Court to its refusal to enforce the statute.

103. 432 U.S. at 94 n.10.

104. *Id.*

merely because one employee had been deprived of his livelihood for following the dictates of his conscience, but because of the impact the case would have on "thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshipping their God."[105]

The Supreme Court in *Trans World Airlines, Inc. v. Hardison* nullified Section 701(j) of the Act, *i.e.*, the duty to make "reasonable accommodations" short of "undue hardship," without finding it unconstitutional. The Court accomplished this by merely refusing to enforce the law. Paradoxical as this decision might at first appear to be, it is perhaps understandable. Mr. Justice Marshall, in his two-pronged examination of the statutory language[106] and the legislative history,[107] argued convincingly that the only way to reconcile the statute and the facts in Hardison's situation would have been to find that TWA had not attempted to meet its duty of accommodation, and that it should, therefore, be required to take steps to do so. Marshall, however, overlooked a crucial factor that the Court recognized: the duty to consider and weigh the competing equities.[108] In Hardison's case, to apply a statute that called for accommodation on the part of the employer would have resulted in an accommodation by Hardison's fellow employees. Except for the payment of premium wages by TWA, none of the proposed accommodations would have had the slightest impact on the employer, but they would have been fundamentally unfair to the other employees. To erode the expectations of many blameless workers, whose rights were based solely on satisfactory and often long service, would have been to ignore the practical realities and necessities of the business world.

Another justification for the Court's refusal to permit TWA to violate the agreement with the union is historical. At one time, employers were free to ignore the interests of their employees, if they so chose.[109] Subsequently, the emergence of a strong labor movement in

105. 432 U.S. at 96-97.

106. *See* text accompanying notes 62-65, *supra.*

107. *See* text accompanying notes 66-73, *supra.*

108. 432 U.S. at 79-81.

109. *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS (1968), where the author notes in the introduction:

> Until the fourth decade of this century, American workers often fought government as well as employers in their efforts to unionize. While there were earlier beginnings, it was in the 1930's that government changed sides and began to foster

this country successfully raised the public's conscience regarding the inequality of bargaining power between labor and management. Congress' reaction to this situation was the passage of legislation[110] which placed pre-eminence upon unionization and the collective-bargaining agreement. It is not inconceivable, therefore, that the Court in *Hardison* chose not to undermine the integrity of the collective-bargaining agreement and its seniority system.

But how this decision came about is not as significant as how far it will extend. Indeed, its application is more universal than its narrow holding that a collective-bargaining agreement's seniority system is not required to yield to an accommodation of a particular employee's religious observances. As Marshall predicted, members of minority religions[111] whose rights are unprotected by typical collective-bargaining agreements are in at least theoretical danger of losing their jobs.[112] Even in the absence of a union contract governing work-scheduling at a business, an employee observing the dictates of his religion will be entitled to no accommodation by his employer if the employer merely speculates that to accommodate him would cause a minor morale problem among the other employees. The language of the decision, which is at total

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> collective bargaining as a method for solving such problems as . . . working conditions . . . and the psychological frustration of the modern worker. Since the thirties, collective bargaining has come to occupy a position at the center of national labor policy.

Wellington further contends that the courts stalwartly blocked the tides of reform legislation favoring unionization and employee bargaining power, by citing *Final Report of the Commission on Industrial Relations*, S. Doc. No. 415, 64th Cong., 1st Sess., 1, 38-61 (1916); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (New York, Macmillan, 1930), note 29 at 52053 n.19: "The growth and development of unions and of collective-bargaining was wrongly impeded, the courts were rightly viewed as instruments of the employer class. . . ." H. WELLINGTON at 26.

110. National Labor Relations Act, c. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151-68 (1970)).

111. Senator Jennings Randolph, in introducing Section 2000e(j) as an amendment to the Civil Rights Act of 1964, stated:

> There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force. . . .There are an additional 425,000 men and women in the work force who are Seventh-Day Adventists. There are . . . 5,000 individuals within [the Seventh-Day Baptists] . . . denomination in the work force.

118 CONG. REC. 705 (1972). This enumeration, of course, represents only a partial estimation of the number of persons whose jobs can be adversely affected by the decision in *Hardison*.

112. 432 U.S. at 96-97.

variance with the language of the statute, indicates that, at least in the area of religious needs, if the rights of the majority are even indirectly adversely affected, the rights of the minority must yield.[113]

At a time when white males are filing reverse discrimination cases against minority-weighted admissions practices in law[114] and medical[115] schools and are questioning the right of women and racial minorities to receive improved job and educational opportunities which are not made available to white males—*e.g.*, "affirmative action"—the *Hardison* decision must not be overlooked. The basic issue in all these cases, which will ultimately mold our society, is the same issue that was decided in *Hardison:* To what extent can the law be applied to give preference to the rights of a minority group member over the rights of the majority? *Hardison* established that, absent a valid secular purpose supporting a statute designed to implement an individual's religious freedom, the rights of the minority will be subordinated to the rights of the majority if the latter's interests are affected. The reverse discrimination cases mentioned above do not, of course, deal with statutes that lack valid secular purpose[116] and, in that sense, they can be distinguished from *Hardison.* However, the rationale behind the *Hardison* opinion demonstrates that the Court is sensitive to the plight of white males who claim that their validly earned expectations of success in the fields of higher education and employment are being thwarted by "affirmative action." Their plight is not very different from that of Hardison's fellow employees at TWA who had labored diligently to attain their position in the seniority hierarchy. How the Court will ultimately resolve the reverse discrimination cases remains to be seen, but it is evident that preferential treatment for minorities to the exclusion of the majority is not an attractive proposition in the eyes of an equity-minded Supreme Court.

Marilyn R. Schwartz

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113. *See* note 102, *supra.*

114. DeFunis v. Odegaard, 416 U.S. 312 (1974).

115. Regents of Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1977), *cert. granted,* 97 S. Ct. 1098 (1977).

116. The purpose of the "affirmative action" programs is to accomplish the integration of minority groups into the working force, the professions, and society as a whole. *See* 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1977) (Tobriner, J., dissenting).