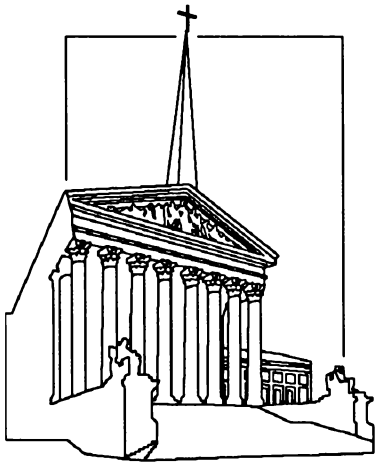

Adventists and America's Courts

The Adventist Church has helped to make U.S. constitutional history. In turn, the courts have influenced Adventist history.

by Ronald L. Lawson

Sects, according to Stark and Bainbridge, are marked by a high "state of tension" with their "surrounding sociocultural environments."[1] Tension is characterized by difference, separation, and antagonism, for a sect and its surrounding society "disagree over proper beliefs, norms, and behavior."[2]

It is not surprising that differences, tensions, and antagonisms have often resulted in conflicts that have been fought out in courts. The first case to argue the Free Exercise of Religion Clause of the U.S. Constitution before the Supreme Court (*Reynolds v. United States,* 1879) upheld the ban on polygamy among Mormons.[3] Jehovah's Witnesses have also been the focus of major cases before the U.S. Supreme Court. The *Minersville School District v. Gobitis* decision (1940) found that American schools had the right to compel children to salute the national flag during daily assembly. In the wake of this decision, violence and intimidation against Witnesses increased dramatically, fanned by wartime patriotic fervor. However, in the midst of World War II, in *Bamette v. West Virginia State Board of Education* (1943), the Supreme Court courageously reversed its earlier decision.[4]

Seventh-day Adventist beliefs have also fostered norms and behavior that have resulted in tension and conflict with American society and have often been fought in court. The most frequent source of dispute has been the Adventist belief that Saturday is the Sabbath. Insistence by Adventists on refraining from work from sundown Friday to sundown Saturday and, earlier, that they should be free to work on Sunday, have resulted in arrests, loss of jobs, and ultimately court cases. Other Adventist practices that have resulted in court battles included their refusal to bear arms in wartime or to join and contribute to labor unions, and also their wish to solicit door-to-door and sell religious publications. In recent decades the Adventist Church, its medical, educational, and publishing institu-

Ronald L. Lawson, Professor of Urban Studies at Queens College, City University of New York, has published widely on Seventh-day Adventists in sociology journals. He was voted College Teacher of the Year by Queens College students in 1991-1992, and by administrators in 1992-1993.

tions, and its members as such have also become increasingly involved in court suits. Two of these cases, in particular, have been cited frequently in subsequent court opinions.

Influencing and Influenced by the Courts

Seventh-day Adventists have been involved in a number of landmark court cases bearing on both the Free Exercise and Establishment clauses of the First Amendment of the U.S. Constitution and on statutory law. The main issues have included security of employment for Sabbath observers, the right of persons dismissed from their jobs for reasons of conscience to unemployment compensation, the right of those with conscientious objections to bear arms in the military to become citizens, and the freedom to choose not to join a labor union.

Cases involving Adventists have created key judicial precedents in the area of religious liberty. Sherbert *propounded the first clear theory of the Free Exercise Clause of the Constitution and became an important precedent, cited in all relevant Free Exercise cases.*

Some of its cases created key judicial precedents in the area of religious liberty. One case that reached the U.S. Supreme Court (*Sherbert v. Verner* 1963) became a pivotal case in the application of the religion clauses of the Constitution. Indeed, the Adventist Church, its medical, educational, and publishing institutions, and its members as such have become increasingly involved in court suits in recent decades.

While cases focusing on Mormons and Witnesses have received considerable attention from scholars, this has not been so with those focusing on Adventists. By tracking changing issues, outcomes, and the growing ease of Adventists with the courts over time, it is possible to trace the decreasing tension of the Seventh-day Adventist Church with its surrounding sociocultural environment.

Cases Related to the Military and Unions

Adventism's involvement in the U.S. court system began in earnest during World War II. Although Adventists conscripted into the military during World War I had faced punishment for refusing to do basic training on their Sabbath, the new close relationship between the Adventist Church and military authorities during World War II usually ensured that problems were avoided or solved amicably. The fact that American Adventist conscripts refused to bear arms did not, then, result in court cases.

A group of cases focused on aliens whose applications for citizenship were opposed by the Immigration Service because they refused to state unequivocally that they were willing to bear arms. One such application, by a noncombatant Adventist soldier, was upheld in court. The court's opinion appealed to the Selective Service and Naturalization Acts, which had created a noncombat service classification and provided for the naturalization of persons performing military duties. The statutory oath of allegiance no longer implied a willingness to bear arms.[5] However, when a noncombatant pastor's wife declared that she would be willing to participate in any kind of war work except to use a weapon, she was denied citizenship.[6] Finally, in the first case involving an Adventist to reach the Supreme Court, the

Court held that Congress had not intended to make a promise to bear arms a prerequisite to naturalization. The Supreme Court said that it was an error to deny citizenship to applicants who were ready to defend the constitution, but because of religious scruples, declared that they would not take up arms to defend the U.S.[7]

In the 1970s, the Adventist Religious Liberty Department became involved in a series of cases endeavoring to help Adventists having job problems because of their refusal to join unions and at the same time make favorable case law. These cases were usually brought under Title VII of the Civil Rights Act of 1964 as amended in 1972 in Section 701(j). It argued that the law obliged both employers and unions to make good-faith efforts to honor the exemptions requested by employees with a conscientious objection to union membership unless this would result in undue hardship.[8] Once it was amended, section 19 of the NLRA was also utilized.

These cases were conclusively settled in *Nottelson v. Smith* (1981), *Tooley v. Martin-Marietta Corp.* (1981), and *International Association of Machinists and Aerospace Workers v. Boeing* (1987), which found that the accommodations requested were reasonable and did not impose undue hardship, and thereafter protected all with religious scruples against union membership.[9]

Although the courts were shown that the Seventh-day Adventist Church "teaches that it is morally wrong to be a member of or pay dues to a labor organization,"[10] this was never a test of fellowship. In fact, for the past several decades, Adventists have been union members. Those who have taken the anti-union position seriously have tended to be more conservative members who continue to try to abide by the writings of Ellen White; they are predominantly Caucasian.[11] Most such Adventists tend to vote Republican and to have occupations that do not make them eligible for union membership. On the other hand, union membership is much more frequent among members of minority racial groups, who are much more likely to be employees and to vote Democrat.[12] Coverage of the teaching on union membership in Adventist publications has declined sharply in the last 15 years, with the result that today many members are not aware of it.

Cases Flowing From Sabbath Observance

Two Supreme Court cases, one in the 1960s, the other in the 1980s, used the Free Exercise Clause to address the issue of an employee who was fired for refusing to work on her Sabbath being declared ineligible for unemployment benefits. The first of these was an appeal by Adell Sherbert, who had worked a five-day week in a textile mill in South Carolina until 1959, when the work week had been changed to include Saturday for all three shifts. Her refusal to work on that day had resulted in her dismissal. When her conscientious scruples prevented her from taking new employment that would require her to violate her Sabbath, Sherbert applied for unemployment benefits. She was denied them on the ground that she had failed to accept suitable work offered to her—a decision that was affirmed by both her county court and the South Carolina Supreme Court.

However, the U.S. Supreme Court reversed this decision, finding that Sherbert's disqualification from benefits on these grounds "imposed a burden on the free exercise of her religion."[13] Justice Brennan's opinion drew attention to the fact that South Carolina law expressly shielded a Sunday worshiper from having to make the kind of choice imposed on Sherbert: "When in times of 'national emergency' the textile plants are authorized. . . . to operate on Sunday, 'no employee shall be

required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority . . . or be discriminated against in any manner.'"[14]

> *Sherbert* was the first case in which the Court upheld a free-exercise claim that was not also supported by free-speech concerns. As such, it [propounded the first clear theory of the Free Exercise Clause of the Constitution]. Building on the earlier Jehovah's Witness cases, *Gobitis* and *Barnette*, the court's opinion applied the doctrine of "strict scrutiny"—the level of court concern, requiring that the state demonstrate a compelling interest if a decision running counter to a religious belief is to withstand challenge—and spelled it out. Sherbert consequently [became an important precedent, cited in all relevant Free Exercise cases].

A similar case with a different wrinkle was decided by the Supreme Court in 1987. After working in a Florida jewelry store for more than two years, Paula Hobbie had informed her employer that she was joining the Seventh-day Adventist Church and could no longer work scheduled shifts on Friday nights and Saturdays. When she was dismissed, she filed for unemployment compensation. Her request was denied on the basis of "misconduct" connected with her work. This ruling was affirmed by the Unemployment Appeals Commission and the Florida Fifth District Court of Appeals.

However, the Supreme Court, in another Brennan opinion, reversed this decision and confirmed *Sherbert*: "When a State denies receipt of a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, that denial must be subjected to strict scrutiny and can be justified only by proof of compelling state interest."[15] This case extended the application of Sherbert to a situation where conflict between employee and employer was caused by the former changing religious beliefs rather than the latter altering work rules.

Hobbie's case was prepared and argued by the staff of the Legal Department of the General Conference of Seventh-day Adventists; indeed, it was "the first church-backed case argued in the United States Supreme

Adventists in U.S. Courts—1891–1997

In *Re Adventist Living Centers*, 52 F. 3d 159 (7th Cir. 1995)

Beadle v. Tampa, 42 F. 3d 663 (11th Cir. 1995)

Cooper v. Oak Rubber Company, 15 F. 3d 1166 (6th Cir. 1994)

Cowan v. Gilless, 81 F. 3d 160 (6th Cir. 1996)

Dawson v. Mizell, 325 F. Supp. 511 (USDC, ED, VA, 1971)

Equal Employment Opportunity Commission and Silver v. Pacific Press Publishing Association, 535 F. 2d 1182 (9th Cir. 1976)

Equal Employment Opportunity Commission v. Pacific Press, 676 F. 2d 1272 (9th Cir. 1982)

Espinoza v. Rusk, 634 F. 2d 477 (both Cir. 1980)

Genas v. State of New York, 75 F. 3d 825 (2d Cir. 1996)

General Conference Corporation of Seventh-day Adventist v. Seventh-day Adventist Congregational Church, 887 F. 2d 228 (9th Cir. 1989)

General Conference Corporation of Seventh-day Adventist v. Seventh-day Adventist Kinship, International, Inc. (USDC, CD CA, 1991. Case No. CV 87-8113 MRP, unentered)

Giroud v. United States, 328 U.S. 61 (1946).

Hinsdale Hospital Corporation v. Shalala, 50 F.3d 1395 (7th Cir. 1995)

Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 1987

International Association of Machinists and Aerospace Workers v. Boeing, 833 F. 2d 165 (9th Cir. 1987)

Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (District Court, E.D. Louisiana 1969)

In *Re King, 46 F. 905; Circuit Court*, W.D. Tennessee (1891)

In *Re Kinloch*, 53 F. Supp. 521 (District Court, W.D. Washington 1944)

Court by a church-employed attorney."[16] Supporting *amici curiae* briefs were filed by an astonishingly diverse list of religious groups—including the American Jewish Congress, the Baptist Joint Committee on Public Affairs, and the Catholic League of Religious and Civil Rights. All these groups feared that *Sherbert* might be reversed, for they saw its broad interpretation of the Free Exercise Clause as in their best interest.

The *Sherbert* and *Hobbie* decisions represented a considerable advance for Adventists in protecting their right to unemployment benefits should they be fired for refusing to work on their Sabbath. However, protection of their jobs was a more important goal. The passage of equal employment legislation eventually allowed Adventists to address some of the ramifications of this problem in the courts. Title VII of the Civil Rights Act of 1964 raised the possibility that this dream would become a reality. It prohibited an employer from discriminating against an employee on the basis of "race, color, religion, sex, or national origin."

However, how this was to be applied to cases where a sabbatarian refused to work on Saturday was unclear, with the result that the cases invoking it produced contradictory results.[17] Some cases brought by Adventists used different grounds, but without success.[18] An amendment, Section 701(j), which was added to the Act in 1972 at the instigation of Senator Jennings Randolph, who was himself a sabbatarian (a Seventh Day Baptist), sought to strengthen the position of sabbatarians by requiring that an employer try to accommodate an employee's religious scruples unless doing so would be an "undue hardship."[19]

Nevertheless, the first cases that sought to define the meaning of the amendment again gave contrary opinions and sometimes evenly divided courts. One court opinion noted: "We recognize that the problems arising from the fact that Seventh Day [sic] Adventists are forbidden to work on Saturdays are troublesome ones and that the courts have not been in accord in their thinking on the subject."[20] The key case, ultimately, proved to be *Trans World Airlines v. Hardison* (1977), which involved not an Adventist but a member of the Worldwide Church of God. *Hardison* acknowledged that an employer must accommodate an employee's religious beliefs and

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Lake v. Goodrich, 837 F. 2d 449 (lath Cir. 1988)

Lewis v. Seventh-day Adventist Lake Region Conference, 978 F. 2d 940 (6th Cir. 1992)

Loma Linda Food Company v. Thomson & Taylor Spice Co., 279 F. 2d 522 (U.S. Ct of Customs & Patent Appeals 1960)

In *Re Losey*, 39 F. Supp. 37 (District Court, E.D. Washington 1941)

Marshall v. Pacific Union Conference, 21 F.E.P. 846 (District Court, C.D. California 1977), cert. denied, 434 U.S. 1305 (1977)

Martin v. Pacific Northwest Bell Telephone Company, 441 F. 2d 1116 (9th Cir. 1971)

New York City Transit Authority v. State of New York, 651 N.Y.S. 375 (Court of Appeals of New York 1996)

Nottelson v. Smith, 643 F. 2d 445 (7th Cir. 1981)

Opoku-Boateng v.. California, 95 F. 3d 1461 (9th Cir. 1996)

Pierce v. Iowa-Missouri Conference, 534 NW 2d 425, cert. denied, 517 U.S. 1220 (1996)

Rayburn v. General Conference of Seventh-day Adventists, 772 F. 2d 1164 (4th Cir. 1985)

Rayes v. Eggers, 36 F.3d 1100 (8th Cir. 1994)

Riley v. Bendix, 330 F. Supp. 583 (District Court, M.D. Florida 1971)

Russell V. Butte Silver-Bow, Montana Human Rights Commission, unreported (1997).

Seventh-day Adventist Congregation Church v. GC Corporation of Seventh-day Adventists, 887 F2d 228, cert. denied, 493 U.S. 1079 (1990)

Sherbert v. Verner, 398 U.S. 1963

Stocker and Perry v. General Conference Corporation of Seventh-day Adventists, 95 F. 3d 1168 (Fed. Cir. 1996)

Tate v. Akers, 565 F. 2d 1166 (both Cir. 1977)

Tooley v. Martin-Marietta, 648 F. 2d 1239 (9th Cir. 1981)

United States v. City of Albuquerque, 545 F. 2d 110 (10th Cir. 1976)

United States v. Schwimmer, 279 U.S. 644 (1929)

practices unless they cause undue hardship. However, it also determined that anything beyond *de minimis* cost would be undue hardship. This definition was so narrow that it provided a poor foundation on which to build cohesive case law. As a result, each succeeding case largely turned on its particular facts and circumstances.

The *Hardison* decision also found that employers are not obliged to violate the seniority provisions of collective bargaining agreements to protect the religious scruples of employees. Because seniority provisions often allowed workers with seniority to choose the shifts that gave them weekends off, this meant that new Adventist employees could not be accommodated.

A General Conference lawyer described *Hardison* to me as a "huge loss"[21]—and, indeed, this has proved to be so. A review of the first 30 reported cases after *Hardison* found that it had become more difficult to win cases focusing on the weekly Sabbath, as compared with those dealing with less-frequent religious holidays, because the frequency and recurring nature of the conflict made it more likely that the courts would declare this a hardship.[22] Since that time, the stronger cases have tended to be settled out of court, so that they have made no contribution to case law. Most of the cases that have gone to court have been lost on the basis of undue hardship.[23]

Following the *Hardison* case in 1977, court victories have been few and less decisive.[24] It proved to be especially difficult for sabbatarians to prevail when a collective bargaining agreement between an employer and a union representing the employees was in place. An Adventist employee was likely to find that he or she faced "almost insurmountable difficulties" because the intransigence of the union guarding cherished seniority provisions. The Adventist position on this issue, which is so important to them, has been sorely weakened by the antagonism generated among labor unions by the earlier attempts to excuse church members from union membership. The effect of the *Hardison* decision on the employer removed any flexibility from the situation.[25]

Three victories in 1996 gave some of the sabbatarian lawyers hope that the tide might finally be turning. In one of these, the U.S. Court of Appeals for the Ninth Circuit found that the employer—the State of California—had failed to establish undue hardship.[26] Two other Adventists won cases that year in state courts as diverse as Montana and New York.[27]

However, that same year, 1996, a case in the Second Circuit of the U.S. Court of Appeals brought by Kingsley Genas, an Adventist employee of the State of New York Department of Correctional Services, against the department and several of its officers, underlined the extent to which the Supreme Court's decision in *Employment Division v. Smith* (1990) had muddied the waters. In Smith, the Supreme Court had rejected, for at least some Free Exercise challenges, the compelling state interest standard, as established in *Sherbert* (1963). It had held that the Free Exercise clause is not offended by a generally applicable law that burdens religious practice if the burden on religion is not the object of the law, but merely the "incidental effect" of an otherwise valid provision. The Second Circuit case was complicated because it invoked both the Free Exercise Clause and case law rooted in Title VII: Genas had claimed that the department and officers had breached the Free Exercise Clause by refusing to accommodate his need to observe his Sabbath. When the defendants' motion for summary judgment was denied, they appealed the decision.

The Court found, in its preliminary decision, that since a collective bargaining agreement had been in place, whose purpose had not been to burden religion but to establish a neutral and fair method of awarding shifts (in

this case, via seniority), the officers could reasonably believe that their actions were in accord with *Smith*: "[t]hough the duty to reasonably accommodate the religious preferences of employees has been clearly established, it has not been established that an employer acting under the terms of a collective bargaining agreement must do more to accommodate religious preferences than is required by the agreement."[28] That is, on the basis of the *Smith* decision, the court threw out the constitutional argument based on the Free Exercise Clause, and restricted the litigation to statutory law, Title VII.[29]

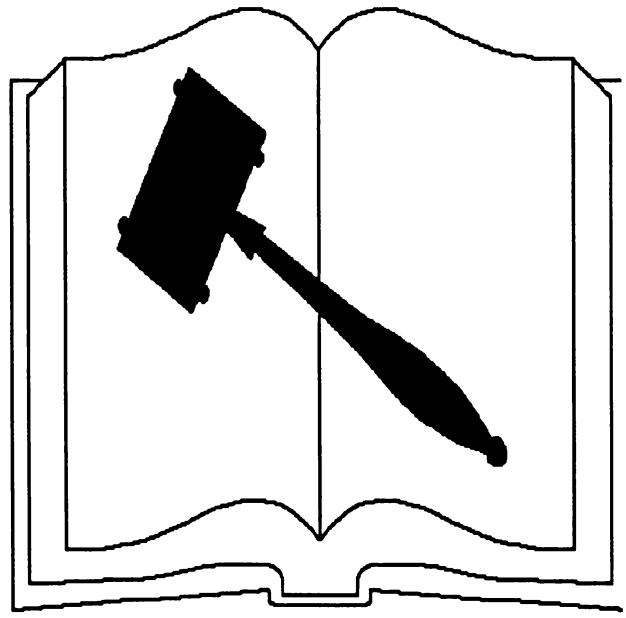
Smith dismantled the protections for Sabbatarians put in place by *Sherbert* in cases where the action being challenged could be seen as generally applicable and neutral in scope. However, *Sherbert* still held where this was not the case. Congress set out to undo what was widely seen as the harm done by *Smith*, by passing the Religious Freedom Restoration Act of 1993. With this act, Congress explicitly re-established a compelling state interest test, similar to that which had been created by *Sherbert*. However, when its constitutionality was tested, the Supreme Court voided the law.[30]

The *Smith* decision by the Supreme Court, and the attempt by Congress to find a legislative remedy in the Religious Freedom Restoration Act, demonstrate that in recent years Congress, more than the courts, has become more protective of religious freedom and of the interests of churches. This raises the question of why the Adventist Church does not channel more of its resources into lobbying and encourage members to become involved in politics. It may be that it feels that the likelihood of it gaining influence in this sphere is severely limited by its relatively small numbers. However, the impact of Senator Jennings Randolph, who came from the much smaller Seventh Day Baptist community, illustrates what is possible.

Other Free Exercise Cases

Adventists fought cases focused on the Free Exercise Clause when local authorities attempted to restrict their door-to-door activities. In 1976, Adventists sought injunctive relief when their "literature evangelism" ran into problems in Laramie, Wyoming, because their colporteurs received a commission on sales. Relief was granted because the colporteurs were credentialed ministers and their activities were judged to be essentially religious.[31] In 1980, Adventists also fought a case in Albuquerque, where the city had judged their solicitation, or "Ingathering," to be secular, and thus requiring a permit. The city pointed out that the funds raised helped to support such church activities as medical, community, and educational services. The church, insisting that these activities were part of its religious mission, asked the court to declare the ordinance unconstitutional. The court agreed.[32]

A few cases have focused on the right of an Adventist to observe the standards of his church while in prison. For example, *Rayes v. Eggers* (1994) focused on the demand of the



prisoners for an Adventist-sanctioned diet. Brought without legal assistance from the church, and poorly documented, it was lost. The problems of Adventist prisoners were described to me as the kind of issue that the Adventist Church is not eager to pursue.[33] This is not because no Adventists are sentenced to prison or that jailhouse conversions to Adventism are rare. Quite the contrary: Although many problems are solved through negotiations, there are a number of potential cases dealing with such issues as dietary problems, Sabbath observance problems, and difficulties with access to worship in prison. However, church leaders are reluctant to pursue them. In part, this seems to be because of a socially conservative law-and-order mentality among Adventist leaders: They comment that one should expect to lose rights when one goes to prison. In part, it is because church leaders often view the plaintiffs as unattractive figures: They are afraid that supporting these members would prove a public relations liability.[34]

Commercial Suits by and Against Adventist Institutions

As Adventist institutions, hospitals, universities and colleges, publishing houses, health food factories, nursing homes, and retirement centers have become less separated from society, they have inevitably become involved in such secular matters as commercial lawsuits. I list three random examples: a suit against an Adventist food company over a breach of trademark law concerning the name of a product (*Loma Linda Food Company v. Thomson & Taylor Spice Co.* 1960); a suit by Hinsdale Hospital against the Federal Department of Health and Human Services over Medicare reimbursement (*Hospital Corporation v. Shalala* 1995); and a suit by a food seller against a nursing home for food delivered shortly before it filed for bankruptcy protection (*Reinhart Institution Foods Inc. v. Adventist Living Centers* 1995).

Personal Suits Against the Adventist Church and Its Institutions

The growth of Adventist institutions, and the closer involvement with society that inevitably followed, also exposed Adventism to government regulation and to legal suits from government agencies designed to bring institutions into conformity with the law when church leaders resisted. These suits were usually brought at the behest of church members. The most important of these are a series of suits brought in the 1970s against the Pacific Press Publishing Association of Mountain View, California. In 1972, Merikay Silver, an editor at Pacific Press, approached the general manager asking that her salary be raised to a level commensurate with her male colleagues. He not only refused her request, but added that no woman there was receiving equal pay; as long as he headed the publishing house none ever would.[35] When informal efforts failed to resolve the dispute, Silver filed a class action suit under Title VII of the Civil Rights Act of 1964[36]—the same antidiscrimination law invoked by Adventists in their efforts to retain their jobs in Sabbath employment cases. With Lorna Tobler, a co-worker, Silver also filed with the EEOC complaints for sex discrimination and retaliation.[37]

Silver's original request to the Pacific Press had invoked the vote of the Annual Council of the General Conference the previous year, 1971, to change the wage scale for North America to allow women to receive a "head of family" allowance if they were in fact acting as such.[38] Adventist leaders had originally reacted strongly against the new labor laws,

seeing them as instances of the government telling the church what to do. The church sought a different solution to their need to be regarded as in compliance with the Federal regulations. However, the negotiating team, which was headed by Neal Wilson, then president of the church in North America, was eventually persuaded to comply in this manner in order to save the church from being seen as in opposition to the government.[39] When Pacific Press rejected Silver's request, it was therefore in violation of the Adventist Church's new policy. Although, as a separate corporation, it was legally free to do this, such independence by an Adventist institution was highly unusual.

Wilson claims that he tried to use the moral authority of the church leadership to encourage Pacific Press to comply with the church's new policy.[40] However, this was without avail. Shortly afterward, he and other church leaders became heavily involved in the press's defense. The defense was based principally on the Free Exercise Clause of the First Amendment. The Adventist Church's dogged persistence in this flowed from beliefs that its institutions, as religious organizations, were immune to antidiscrimination laws, and from a fear of state interference that was rooted in its apocalyptic expectations of persecution at the hands of the American government.

Indeed, church leaders became so determined to win the case that at the quinquennial General Conference Session (the only occasion at which changes in doctrine or the *Church Manual* can be voted) in Vienna in 1975 they pushed through two changes in the manual that were designed to strengthen the hand of the press in this case. First, the General Conference in session modified the rule that only local churches can disfellowship members by creating a loose disciplinary relationship among congregations in which a church employee holds membership and the employing organization. Henceforth the congregation and the denominational employer would inform each other about any action against the member-employee. Second, the session added to the reasons for church discipline: "Instigating or continuing legal action against the church or any of its organizations or institutions, contrary to Biblical and Ellen G. White counsel."[41]

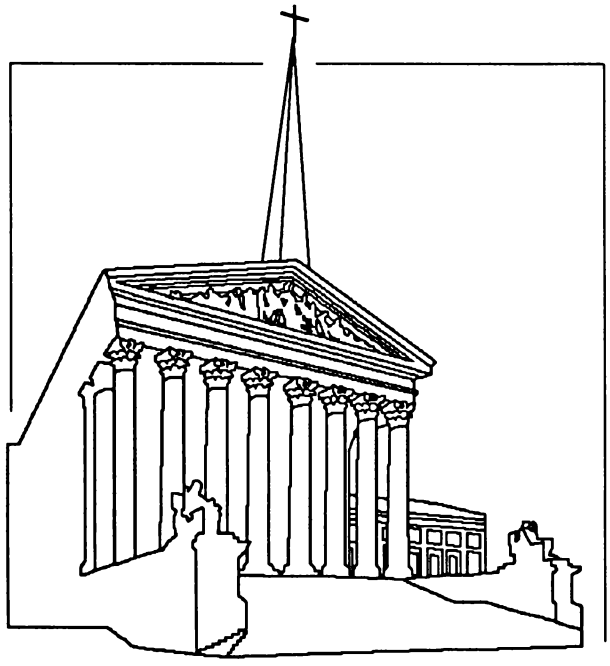
The Fifth Circuit Court's opinion regarding the Pacific Press broadened the Title VII Civil Rights provisions to millions of employees of religious institutions. The court's opinion has been frequently cited in other Free Exercise and Establishment of religion cases.

Since all employees of the Pacific Press had to be Seventh-day Adventist Church members in regular standing, these changes, especially the second one, could have made it easier for church authorities to secure the dismissal of Silver and Tobler. The president of the press, who was senior elder of the local Adventist church, invoked the first change in moving—unsuccessfully—to have his congregation disfellowship Tobler.[42] However, after news of the second change became known, it ran into such strong opposition from Adventist lawyers in America that it was excluded when the manual was reprinted.[43]

The court brief from Pacific Press did claim that lawsuits against the church by members were doctrinally prohibited—a statement whose historical support was exaggerated.[44] Moreover, the press used the contravention of this "doctrine" by Silver and Tobler as the ground for dismissing them. This action subsequently became the center of the EEOC

charge that the press had retaliated against them because they had filed an antidiscrimination suit based on Title VII.[45]

Ultimately the total number of suits flowing from this dispute grew to five, two of which were taken to the Ninth Circuit Court of Appeals. Silver, worn down by long delays and the emotional tension of the cases, eventually settled her suit out of court. The key case became that filed by the EEOC on behalf of Tobler (1982). It charged sex discrimination and retaliation in violation of Title VII. When the district court found for Tobler, the press appealed the case to the court of appeals. However the latter upheld the lower court's decision. Its opinion found that Congress had intended to prohibit religious organizations from discriminating among their employees; that Tobler fell under the provisions of the act because she did not, as the press had argued, fulfill the functions of a minister; and that the application of Title VII to the publishing house did not violate the First Amendment. Moreover, even though Tobler's dismissal was based on her violation of a church doctrine prohibiting lawsuits by members against the church, Title VII established compelling governmental interest in eliminating employment discrimination. Its prohibition of retaliation applied to the press. To permit retaliation by the press against Tobler would have resulted in the withdrawal of the protection of Title VII from the employees of the many diverse Adventist institutions in the U.S.[46] The opinion noted that if Tobler had been disfellowshipped, the case would have become immune from judicial review. However, after her dismissal from employment at the press, Tobler's local church had certified that her membership was in good and regular standing.



By the time the Fifth Circuit Court's decision was announced, two of its other decisions pointed in the same direction.[47] The Pacific Press opinion broadened the impact of the application of Title VII to religious institutions, confirming that it could be applied constitutionally to at least some of the employees there. The court opinion also validated some of these employees as secular workers rather than ministers.[48] The court's opinion has affected the rights of millions of employees of religious organizations. The opinion has since been cited widely in other cases. It has also been cited frequently in other cases where government regulation of religious activity is challenged as a violation of the Establishment Clause. The case also emphasized that the absolute free exercise claim made by attorneys for the press is not part of American constitutional law.[49] Adventist leaders chose not to appeal the decision to the Supreme Court. By that time, it was clear that they would have lost there also, thus compounding the significance of the outcome.

The Pacific Press cases were fought during the same period as Adventists were working, in Congress and the courts, for the right of members to opt out of labor unions. The

cases also followed on the heels of a period when church leaders had become openly concerned about the possibility of labor unions organizing the employees of their institutions. Church leaders were especially worried about the hospitals, where the proportion of non-Adventists in the workforce was increasing rapidly. Such concerns had first been expressed in 1957, and by 1960 guidelines had been issued to hospital administrators that were designed to forestall the establishment of labor unions in Adventist hospitals.[50]

These fears became more pressing when amendments to the National Labor Relations Act in 1974 extended its coverage to nonprofit healthcare institutions and allowed employees to vote on whether to have a union represent them. Although the amendments allowed employees to opt out of a union for religious reasons,[51] there was no such provision for institutions owned by churches. When employees at an Adventist-owned nursing home petitioned for an election, the National Labor Relations Board, despite objections from the nursing home, ordered an election. It found that Congress had intended that the act apply to healthcare institutions operated by religious institutions in general, and by the Adventist Church in particular. However, although only three of the 146 employees eligible to vote were Adventists, the union lost. When a second election was scheduled at an Adventist hospital,[52] the Adventist Church went to court to have the election declared void and unconstitutional. This action was rendered moot when again the union lost the election.[53]

By the early 1970s, church administrators were worried about the possibility of labor problems emerging in the institutions that were usually staffed exclusively by Adventists, so they expressed considerable concern about Adventist teachers and professional organizations:

> The church asked its teachers to carefully examine professional organizations before joining or supporting them to determine whether they operated as labor unions in addition to pursuing professional objectives. As a substitute for membership in organizations that might be perceived as unions, the denomination urged Adventist educators to organize themselves into an Association of Seventh-day Adventist Educators.[54]

The Pacific Press cases raise the question of the extent to which the Adventist anti-labor union position was now driven by the church's role as an employer of what had become a huge workforce; by its desire to use religion to maintain low wages; and by the ability of the church's "old boy network" to monopolize positions of power.

Increasing numbers of other members pressed suits against their church that did not attract the intervention of government agencies. The most significant of these was brought by Carole A. Rayburn, a woman who, after earning a Ph.D. in psychology, had then completed a Master in Divinity at an Adventist seminary. When she was denied a pastoral position, she charged the church with—again—sexual discrimination under Title VII of the Civil Rights Act of 1964.[55] When the church

was granted summary judgment in the U.S. District Court for the district of Maryland, her appeal was heard by the U.S. Court of Appeals, Fourth Circuit, in 1985. The court commented that the case raised "significant questions about the application of the civil rights laws to churches."[56] It explored the difference between the Pacific Press case, where the defendant was a church-owned institution and the plaintiff, the court had decided, was not a minister, and the Rayburn case, where the church itself was sued by a would-be minister.

The case highlighted the tension that had developed between the constitutional protection of freedom of religion and the attempts, through statutes, to eradicate all forms of discrimination. On the one hand, in the Pacific Press case, Title VII permitted religious discrimination—religious institutions were allowed to insist on hiring their own members—but Title VII did not permit discrimination on the basis of sex, race, etc. On the other hand, the court in *Sherbert* described the right of persons to believe and practice their beliefs according to conscience as "fundamental to our system." This freedom is also guaranteed to churches in their collective capacities, which must have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Since "ecclesiastical decisions are generally inviolate," and "the right to choose ministers without government restriction underlies the well-being of religious community," attempts to restrict a church's free choice of clergy "constitutes a burden on [its] free exercise rights."

Given the tension described, everything depended on how the court balanced the two interests. It ruled that the balance weighed in favor of the free exercise of religion: that "the introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state." That is, the Court of Appeals affirmed the judgment of the district court because "state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority."[57]

The *Rayburn* decision has since often been cited in cases which have sought to apply civil-rights laws to churches and church-related organizations. For example, it was cited by the U.S. Court of Appeals, Sixth Circuit, in a case where a minister who had been dismissed by the Adventist Lake Region Conference alleged breach of contract because the conference did not follow its own procedural rules. The court held that the First Amendment barred civil review of a decision to discharge a minister even under such circumstances. The court also distinguished between the role of a minister, as in *Rayburn* (1985), and an employee of a publishing house, as in *Pacific Press* (1982).[58]

Suits Brought by the Adventist Church

As the church leadership became more at ease with society, it increasingly adopted a corporate model for structure of the church. One corollary of this was the decision to trademark the name of the church, which it completed in 1981.[59] The purpose of this move, which came at a time when church leaders were becoming increasingly nervous about pluralism among Adventists, was to control which groups could use the church's name and, in particular, to prevent splinter groups or organizations which they regarded as unsavory from seeming to claim affiliation with the church.

This was a most unusual decision within religious polity, where we are used to multiple groups bearing the name "Baptist,"

"Pentecostal," "Methodist," or "Catholic," so that these names in fact signify broader "religious families." There is also a broad "Adventist" family, whose other members, such as the Advent Christian Church, like their Millerite forebears, continue to refer to themselves as "Adventists." Moreover, there is also a more circumscribed "Seventh-day Adventist" family, which includes such groups as the "Seventh-day Adventist Reform Movement," dating from about 1920, and various groups of "Davidian Seventh-day Adventists," who originally broke with the Adventist Church in the late 1930s. Because they have used the trademarked name for so long, the ability of the Adventist Church to force these groups to change names has, according to the legal doctrine of *laches*, vanished with the passage of time.

Consequently, when the General Conference of Seventh-day Adventists brought pressure on groups using the trademarked names in the latter-1980s, these were mostly "David and Goliath" maneuvers, in which the Adventist Church was cast as Goliath and took on small, recent, schismatic congregations which, without the resources to do battle in the court system, typically caved in on receipt of the initial threat. Only one of these cases, against a schismatic Hawaiian congregation, the Seventh-day Adventist Congregational Church, and its pastor, John R. Marik, reached the U.S. Court of Appeals (Ninth Circuit). But even in this case, the disparity in resources was central, for the mistakes made by Marik, who tried to represent the schismatic church himself, crippled its defense.[60]

Adventist involvement in the courts has passed through phases. The first cases, when individual Adventists were arrested for working their farms on Sundays during the second half of the 19th century, confirmed the urgency of Adventist apocalyptic expectations.

More dramatic was the suit against Seventh-day Adventist Kinship International, Inc., a "support group for gay and lesbian Seventh-day Adventists, their families and friends," in the U.S. District Court for the Central District of California, which was completed in 1991. The General Conference brief showed just how difficult it was to fit the language of a statute intended for commercial regulation to the activities of a church. The brief described everything in terms of unfair commercial competition. It made the claim that competition from SDA Kinship's newsletter was undermining its publishing empire and that Adventists were likely to contribute heavily to SDA Kinship (mistaking it for the official tithe/offering conduit). The denomination's suit made no mention of homosexuality, or that this was an organization of gay and lesbian Adventists. However, the antipathy of Adventist leaders to gay and lesbian Adventists, particularly their carrying banners proclaiming their name in Gay Pride parades,[61] is revealed by the fact that this was the only such suit where the Seventh-day Adventist Church sought damages: "Exemplary, punitive, and treble damages."

When church leaders filed this suit against an organization with fewer than 1,000 members, they failed to take the strength of the gay movement into account: The case was accepted by National Gay Rights Advocates, which arranged for Fullbright and Jaworski, a major legal firm, to defend Kinship on a *pro bono* basis. The church lost the case, at an admitted cost of more than $200,000.[62] In her

opinion, Judge Mariana Pfaeizer pointed out that the term "Seventh-day Adventist" has a dual meaning, applying to the church but also to adherents of the religion. She found that the Seventh-day Adventist religion pre-existed the Seventh-day Adventist Church, that the uncontested use of the name by the Reform Movement and the Davidians indicated that the term does more than suggest membership in the mother church, and that the term, as used by Kinship, merely describes that organization in terms of what it is, an international organization of Seventh-day Adventists. Consequently, the judge found that "as used by SDA Kinship, the terms 'Seventh-day Adventist,' and its acronym 'SDA' are generic, and are not entitled to trademark protection."[63] Fearing a more devastating loss in the Court of Appeals, the General Conference chose not to appeal this result.

In 1996, an Adventist member offended by the fact that his church had trademarked its name, challenged its registration. The Trademark Trial and Appeal Board of the Patent and Trademark Office found the mark to be validly and federally registered: "for a period of over 130 years, the primary significance of the designation 'Seventh-day Adventist' has been to identify the source or origin of religious publications and services emanating from respondent [the Seventh-day Adventist Church]."[64] (Most members would no doubt be surprised to find the primary significance of the name of their church attached to such a commercial meaning.) When appealed to the Appellate Court, this decision was upheld in a case in which the appellant failed to appear.[65] The decision found that while *Adventist* was generic, *Seventh-day Adventist* was not. This decision cannot impinge on the right of the Seventh Day Adventist Reform Movement, the Davidian Seventh-day Adventists, or Seventh-day Adventist Kinship International, Inc. to use their names. But the court's decision can be used to prevent new splinter groups within the Seventh-day Adventist family of religious groups from identifying their ties to it in their names.

Conclusion

Adventist involvement in the courts has passed through phases that mark the movement of Adventism along the route from sect to denomination. The first cases, when individual Adventists were arrested for working their farms on Sundays during the second half of the 19th century, were much more than an economic imposition on members who had scrupulously observed their Sabbath on the previous day. The first cases confirmed the urgency of Adventist apocalyptic expectations. These distressing events reflected how separated Adventists were in their expectation of the imminent "end of the world." The ways in which neighbors reported them to the police and they were forced to endure arrest and imprisonment, revealed how communities viewed Adventists antagonistically. This confirmation of their apocalyptic expectations, together with the absence at that time of legal remedies for their plight, resulted in a fairly passive legal response to the problems.

There followed a period of some decades when the tension between Adventism and its social and political environment began to lessen. As Adventists built institutions and sought accreditation for them, they fought politically to delay the government persecution that they continued to believe would be the last sign heralding the return of Christ. Seventh-day Adventists consequently changed their position on military service from conscientious objection to noncombatancy, and began to experience upward mobility. This time of transition was marked by the almost complete absence of Adventists from the courts.[66]

Adventist cases returned to the courts dur-

ing World War II with the issue of would-be immigrants who were noncombatants. This occured just as church relations with the U.S. military were strengthened by the military cadet training program. The years from the Korean War through the Vietnam War continued the sharp relaxation in tension. The U.S. military appointed Adventists as military chaplains. The church established a special military camp where noncombatants received their basic training. Adventists formed the majority in a biological warfare research program designed by the military especially for Adventists. The church accepted government grants by Adventist hospitals and educational institutions. Ultimately, Adventists even retreated from their commitment to noncombatancy in military service. The reciprocal acceptance by the U.S. Government of Adventists was symbolized by a major Supreme Court free exercise case,[67] which granted sab- batarians fired for reasons of conscience the right to unemployment benefits.

The period since the Vietnam War has celebrated and consolidated Adventism's new, much more comfortable relationship with society. With the multiplication of cases brought by Adventists into U.S. courts, the General Conference has concurrently restructured and expanded its legal department and sharply increased the proportion of cases litigated in-house.[68] The court cases of this period extended the protection of unemployment benefits for those dismissed because of Sabbath conflicts to new converts; protected members with a conscientious objection to union membership; and recognized the right of Adventists to engage in door-to-door activity.

However, the majority of cases have not achieved their goal. They have focused on attempts to preserve the jobs of sabbatarians through application of the antidiscrimination clauses of Title VII of the Civil Rights Act. Because of a narrow interpretation given by the courts to the escape clause that accommodation should not cause an employer "undue hardship," the cases have brought little relief to Adventists. Although the coming of the five-day week removed many of the problems faced by sabbatarians, the increasing use of shift work in recent decades presents some Adventists with serious problems.

Throughout most of the history of Adventism, members who felt aggrieved by their church had little recourse. There was no effective internal mechanism for achieving justice available, other than, during her lifetime, attempting to persuade Ellen White, Adventism's charismatic figure, to intervene on their behalf. The denominationalizing of Adventism was reflected in, and in turn influenced by, its involvement in the courts. As the church moved from sect toward denomination, Adventists became more familiar with formal methods of dispute resolution. As part of this process, it developed a growing ease with use of the legal system.

NOTES AND REFERENCES

1. Rodney Stark and William S. Bainbridge, *The Future of Religion* (Berkeley, Calif.: Univ. of California Press, 1985), p. 23.

2. Ibid., p. 49.

3. It found that while the First Amendment guaranteed freedom of religious belief, it did not necessarily protect freedom for any sort of practice and behavior (Armand L. Mauss, *The Angel and the Beehive: The Mormon Struggle With Assimilation* [Urbana, Ill.: Univ. of Illinois Press, 1994], p. 21; and Edwin B. Firmage and R. Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900* [Urbana, Ill.: Univ. of Illinois Press, 1988]).

4. M. J. Penton, *Apocalypse Delayed* (Toronto: Univ. of Toronto Press, 1985), p. 143; and J. A. Beckford, *The Trumpet of Prophecy: A Sociological Study of Jehovah's Witnesses* (New York: Wiley, 1975), p. 35.

5. In *Re Kinloch*, 53 F. Supp. 521 (District Court, W. D. Washington 1944).

6. The basis was three earlier cases (*United States v.*

Schwimmer 1929, *United States v. Macintosh* 1931, and *United States v. Bland* 1931) that had found against applicants who announced that they would not, as naturalized citizens, assist in the defense of the nation (In *Re Losey*, 39 F. Supp. 37 [District Court, E.D. Washington 1941]).

7. *Giroud v. United States,* 328 U.S. (1945).

8. Although the purpose of Senator Jennings Randolph in introducing the 1972 amendment that became Section 701(j) of the act was to apply it more readily to Sabbatarians whose jobs were threatened, the principle it established, that employers should accommodate the consciences of employees except where this would cause undue hardship, proved relevant also to cases where employees held a conscientious objection to union membership.

9. Nottelson and Tooley were both Adventists, but Nichols, the employee in Boeing, was not. The latter decision built upon *Tooley.*

10. *Nottelson v. Smith,* 643 F. 2d 445 (7th Cir. 1981).

11. However, the following reminiscence by a General Conference lawyer illustrates the diversity of opinion on this issue among Adventists: "I remember going to visit a labor leader in New York City who was puzzled by our members. In a nursing home that had been unionized, one SDA was the union representative, and another refused to join the union. The first was the wife of a pastor and the second was a local elder. Both were black."

12. Interview. (Footnotes marked *interview* refer to interviews conducted by Ron Lawson).

13. *Sherbert v. Verner,* 398 U.S. (1963).

14. S.C. Code, s 64-4.

15. *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136 (1987).

16. Robert W. Nixon, "Landmarks in the Law," *JD* (1988), 45-48.

17. *Jackson v. Veri Fresh Poultry, Inc.,* 304 F. Supp. 1276 (District Court, E.D. Louisiana 1969); *Riley v. Bendix,* 330 F. Supp. 583 (District Court, M.D. Florida 1971).

18. *Martin v. Pacific Northwest Bell Telephone Company* 441 F. 2d 1116 (9th Cir. 1971); *Dawson v. Mizell,* 35 F. Supp. 511 (USDC, ED, VA, 1971).

19. Randolph stated, when speaking to the amendment, that its purpose was to "resolve many of the issues left open by prior 'Sabbatarian' cases, where employees had refused to work on their Sabbath and requested that their employers accommodate them."

20. *United States v. City of Albuquerque,* 545 F. 2d 110 (10th Cir. 1976).

21. Interview.

22. Thomas E. Wetmore, "Hardison Plus Five," *JD* 1983 pp. 23-24.

23. *Cooper v. General Dynamics,* 15 F. 3d 1166 (6th Cir. 1994), *Beadle v. Tampa,* 42 F. 3d 663 (11th Cir. 1995), *Cowan v. Gilless,* 81 F. 3d 160 (6th Cir. 1996).

24. For example, *Lake v. Goodrich* 837 F. 2d 449 (lath Cir. 1988), where an Adventist won a grudging, split decision acceptance of a lower court decision when it was appealed by the employer to the court of appeals.

25. Lee Boothby and Robert W. Nixon, "Religious Accommodation: An Often Delicate Task," *JD* (1983), pp. 45-51.

26. *Opuku-Boateng v. State of California,* 95 F. 3d 1461 (9th Cir. 1996).

27. *New York City Transit Authority v. State of New York,* 651 N.Y.S. 375 (Court of Appeals of New York 1996); *Russell v. Butte Silver-Bow,* Montana Human Rights Commission, unreported (1997).

28. *Genas v. State of New York,* 75 F. 3d 825 (2d Cir. 1996).

29. The case is still in litigation at the time of writing.

30. *City of Boerne v. Flores,* No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997).

31. *Tate v. Akers,* 565 F. 2d 1166 (both Cir. 1977).

32. *Espinoza v. Rusk,* 634 F. 2d 477 (both Cir. 1980).

33. Interview.

34. Ibid.

35. George Wood Colvin, Jr., "The Women, the Church, and the Courts: Sex Discrimination and the First Amendment," Ph.D. Dissertation in Government, (Claremont Graduate School 1986), p. 1.

36. *Equal Employment Opportunity Commission and Silver v. Pacific Press Publishing Association,* 535 F. 2d 1182 (9th Cir. 1976).

37. Merikay McLeod, *Betrayal* (Loma Linda, Calif.: Mars Hill, 1985).

38. General Conference of Seventh-day Adventists, *Autumn Council: Actions Pertaining to the North American Division* (Washington, D.C.: Review and Herald Publishing, 1971) pp. 39-45.

39. Interview.

40. Ibid.

41. Colvin, "The Women, the Church, and the Courts: Sex Discrimination and the First Amendment," pp. 300-307.

42. McLeod, *Betrayal,* p. 285.

43. Colvin, "The Women, the Church, and the Courts: Sex Discrimination and the First Amendment," p. 310.

44. Ibid., p. 297.

45. Ibid., p. 496. The claim of a religious belief against litigation is different from the usual Free Exercise claims that laws require petitioners to do something against their belief in the sense that the former focuses not on something the petitioner feels he or she cannot do, but would constrain someone else—an employee or member—from suing the church.

46. *Equal Employment Opportunity Commission v.*

Pacific Press, 676 F. 2d 1272 (9th Cir. 1982).

47. *Equal Employment Opportunity Commission v. Mississippi College,* 626 F. 2d 477 (5th Cir. 1980); *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary,* 651 F. 2d 277 (5th Cir. 1981).

48. Colvin, "The Women, the Church, and the Courts: Sex Discrimination and the First Amendment," p. 479-480.

49. Ibid., pp. 476, 487, 575.

50. Robert C. Kistler, *Adventists and Labor Unions in the United States* (Washington, D.C.: Review and Herald Publishing, 1984), pp. 66, 67.

51. Ibid.

52. Hackettstown Community Hospital, in New Jersey.

53. Kevin Wilson, "Health-Care Institutions and Labor Unions," *JD* (1981), pp. 18-21.

54. Kistler, *Adventists and Labor Unions in the United States,* p. 69.

55. The irony of this case is that the position had been awarded to another woman.

56. *Rayburn v. General Conference of Seventh-day Adventists,* 772 F. 2d 1164 (4th Cir. 1985).

57. Ibid.

58. *Lewis v. Seventh-day Adventist Lake Region Conference,* 978 F. 2d 940 (6th Cir. 1992).

59. The General Conference registered a trademark on "Seventh-day Adventist," and "Adventist" in the U.S. A General Conference lawyer explained that although "SDA" was not listed, they were ready to assert that it was protected under the umbrella if there were a controversy over it.

60. *General Conference Corporation of Seventh-day Adventist v. Seventh-day Adventist Congregational Church,* 887 F. 2d 228 (9th Cir. 1989).

61. Duncan Eva, "Letter to Various Church Employees," August 19, 1986.

62. Kenneth Edward Piner, "'Seventh-day Adventist' Not Always a Trademark," Spectrum 22:1 (March 1992), pp. 63, 64.

63. *General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Kinship, International, Inc.* (USDC, CD, CA, 1991. Case No. CV 87-8113 MRP, unentered).

64. Adventist News Network, *ANN Bulletin* (Seventh-day Adventist Church World Headquarters), March 8, 1996.

65. *Stocker and Perry v. General Conference Corporation of Seventh-day Adventists,* 95 F. 3d 1168 (Fed. Cir. 1996).

66. See Lawson's article in *Spectrum,* Volume 24, number 4, April 1995, for further information.

67. *Sherbert* (1963).

68. In addition to the General Counsel, who heads the department, its staff now contains five other full-time attorneys specializing in religious discrimination law and church-state relations; tax law; employee benefits and pensions; corporate and constitutional law; estate planning; employment, immigration and naturalization; and sexual misconduct.