

# Supreme Court of the United States

OCTOBER TERM 1970

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Supreme Court, U. S.

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In the Matter of:

Docket No. 835

ROBERT KENNETH DEWEY,

Petitioner

VS

REYNOLDS METALS COMPANY,

Respondent

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Place WASHINGTON D.C.

Date April 20, 1971

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Washington, D. C.

NA 8-2345

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

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 ROBERT KENNETH DEWEY, )  
 )  
 Petitioner )  
 )  
 vs ) No. 835  
 )  
 REYNOLDS METALS COMPANY, )  
 )  
 Respondent )  
 )  
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The above-entitled matter came on for argument  
 at 2:50 o'clock p.m. on Tuesday, April 20, 1971.

BEFORE:

DONALD F. OOSTERHOUSE, ESQ.  
 WARREN E. BURGER, Chief Justice  
 HUGO L. BLACK, Associate Justice  
 WILLIAM O. DOUGLAS, Associate Justice  
 JOHN M. HARLAN, Associate Justice  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice  
 HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

DONALD F. OOSTERHOUSE, ESQ.  
 950 Union Bank Building  
 Grand Rapids, Michigan 49502  
 On behalf of Petitioner  
  
 LAWRENCE G. WALLACE, ESQ.  
 Office of the Solicitor General  
 Department of Justice  
 Washington, D. C. 20530  
 On behalf of the United States as  
 amicus curiae

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1 APPEARANCES: (Continued)

2 WILLIAM A. COUGHLIN, JR., ESQ.  
3 4200 Penobscot Building  
4 Detroit, Michigan 48226  
5 On behalf of Respondent  
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 835, Dewey against Reynolds Metals Company.

Mr. Oosterhouse you may start whenever you are ready.

ORAL ARGUMENT BY DONALD F. OOSTERHOUSE, ESQ.

ON BEHALF OF PETITIONER

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

This case involves an interpretation of the Civil Rights Act of 1964 as it applies to discharge of an employee because of his religion. The case also involves the question of election of remedies where an employee proceeds to arbitration under the labor contract and also seeks to assert his rights under the Civil Rights Act, including suit in Federal Court.

After 15 years of employment by Reynolds Metals Company, Petitioner Robert Dewey was progressively disciplined and discharged for refusing to work on assigned Sundays. There were three Sundays involved in 1966: August 28, September 4, and September 11.

Dewey's refusal to work on those Sundays was based on his stipulated religious beliefs which prohibited him from working on Sunday. He had communicated these beliefs to Reynolds sometime prior to any of the Sundays in question.

1 Dewey's stipulated religious beliefs also forbade  
2 him from asking another person to work in his place and this  
3 religious belief also had been communicated to Reynolds prior  
4 to any of the Sundays in question.

5 Q Do I correctly understand that his  
6 religious beliefs, however, did not prevent the company from  
7 getting somebody else in his place?

8 A This is surely true, Your Honors.

9 Q As long as he's not doing it.

10 A That's correct; the question boils down  
11 to who must ask the employee to work.

12 Q Is that the line of distinction, as to  
13 who must ask?

14 A It is certainly our position that with  
15 these stipulated religious beliefs the duty falls on Reynolds  
16 to ask another employee to work in Mr. Dewey's place.

17 Q I thought the record shows, Mr.  
18 Oosterhouse, that your client, Mr. Dewey, had, in fact, asked  
19 others to work in his place.

20 A He had prior to this time asked others to  
21 work in his place. The religious conviction against doing that  
22 apparently developed and matured later as he was in this  
23 situation.

24 Q Suppose an employer in a particular small  
25 enterprise has all of his employees who share this belief.

1 What does he do about that? And no one will work on Sunday.

2 A Well, that obviously presents a difficult  
3 situation in terms of the Commission's guidelines and it might  
4 well be in that kind of a situation that undue hardship upon  
5 the employer would exist.

6 There are many possible variations here and I  
7 would think if the employer schedules Sunday work as a regular  
8 full-time day this is reasonably within his discretion.

9 Q There are many enterprises, of course, in  
10 which the employer has no choice about it: a public utility,  
11 electric power company, telephone company. Let's assume that it  
12 is a situation in which the employer has no choice. He has a  
13 franchise which requires him to give 24 hours service, seven  
14 days a week, at all times, and then alter it a little bit.  
15 Suppose he has ten employees and five of those  
16 assert this privilege as was suggested, I think, in one of the  
17 briefs and all of the Sunday work falls on the other five who  
18 are not observant of the Sabbath?

19 A Well, I think the rationale to answer this  
20 has to be in terms of the undue hardship. And I would like to  
21 point out that, while hypotheticals of much more difficult  
22 situations can be easily imagined, the facts are in this case  
23 that on each of the three Sundays involved, substantially less  
24 than all of the employees in Mr. Dewey's classification were  
25 called upon to work.

1           And further, that there were two employees out of  
2 the classification who were nonetheless, qualified to work.  
3 On one of the days in question Reynolds, in fact, asked one of  
4 these employees to work in Dewey's place. That is, one of the  
5 employees outside of the classification and he didn't work.  
6 And none of the horrible consequences which we read about and  
7 predicted in Reynolds' brief, actually happened, even though  
8 on that Sunday Reynolds did accommodate, as we say they should.  
9 However, on that day they still disciplined Mr. Dewey.

10           Now, if Reynolds had scheduled Sunday as a whole  
11 shift day regularly we would have a different situation. We  
12 would need evidence from Reynolds, which we do not have in this  
13 case, as to attempts to accommodate Dewey's religious beliefs  
14 in other ways.

15           Would it be possible, for example, to schedule  
16 extra overtime on Saturdays and on Mondays for Dewey. This  
17 would be a factual question as to whether this would be a  
18 reasonable solution to get the work done.

19           Now, if you take an example where every single  
20 person in a classification objects to working on Sunday I  
21 suppose the employer would experience undue hardship, although  
22 again, this might bear some further investigation as to  
23 possible ways to get this work done within the requirements of  
24 the company by late Saturday overtime and early Monday over-  
25 time or any one of a number of possibilities which might be



1 arrived at, without undue hardship.

2 When Mr. Dewey was discharged he pursued  
3 his rights both under the Civil Rights Act of '64, starting  
4 by filing a charge with the Michigan Civil Rights Commission  
5 and following the timely procedures of filing with the EEOC  
6 and ultimately starting action in the District Court in the  
7 Western District of Michigan.

8 Almost simultaneously he also started the  
9 grievance procedure under the contract. This contract had a  
10 provision for binding arbitration. His grievance was processed  
11 through arbitration prior to the time he had begun suit in the  
12 Western District of Michigan and the ruling of the arbitrator  
13 gave him no relief. The ruling of the arbitrator was based on  
14 language in the contract which is not similar to the language  
15 in the Civil Rights Act, and he found that while this language  
16 was intended to provide for occasional circumstances, it was  
17 not intended to exempt an employee from every Sunday working.

18 In the arbitration hearing Mr. Dewey was  
19 represented by his union and not by an attorney. Reynolds was  
20 represented by Attorney William Coughlin, and while Reynolds  
21 filed a post-hearing brief, the union did not.

22 The arbitration opinion, I think, makes clear that  
23 the Civil Rights Act was not, in fact, considered by the  
24 arbitrator.

25 The applicant language of the statute: Section

1 703(a) (1) --

2 Q Do you think that --

3 A No, it was not.

4 Q Do you feel that if the arbitrator had  
5 looked into the statute that it would be outside of the --

6 A Well, of course, the arbitrators have  
7 different views of how much they will look into statutes.  
8 I would think the correct view of the relations between this  
9 statute and arbitration is that even if he had discussed the  
10 Civil Rights Act the arbitration should not be considered as  
11 binding.

12 Q Well, let's assume there is an --

13 A Do you mean not under disputes arising  
14 under the contract, Your Honor? I would say that that clause  
15 if agreed to by the union, is going beyond its power in bar-  
16 gaining away an individual employee's rights under the Civil  
17 Rights Act --

18 Q (Inaudible)

19 A I do think that this is the best inter-  
20 pretation, Your Honor, although I recognize it is possible to  
21 use a Spielberg type approach in taking a look at the  
22 arbitration to see what actually happened and to see whether  
23 proper conditions were met.

24 MR. CHIEF JUSTICE BURGER: We will resume at 10:00  
25 o'clock in the morning, Counsel.

1 (Whereupon, at 3:00 o'clock p.m. the argument in  
2 the above-entitled matter was recessed to be resumed at 10:00  
3 o'clock a.m. on Wednesday, April 21, 1971.)  
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