

The Burger Court Opinion Writing Database

White v. New Hampshire Department of Employment Security

455 U.S. 445 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

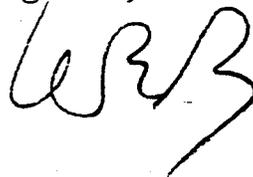
January 28, 1982

Re: No. 80-5887 - White v. New Hampshire Dept. of
Employment Security

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W.P.', written in a cursive style.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

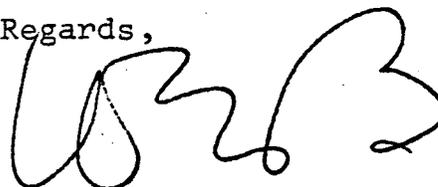
February 22, 1982

Re: No. 80-5887 - White v. New Hampshire Dept. of
Employment Security

Dear Lewis:

I can live with the change under "option 3."

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 6, 1982

RE: No. 80-5887 White v. New Hampshire Department of
Employment Security

Dear Lewis:

I agree.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 4, 1982

Re: White v. New Hampshire (No. 80-5887)

Dear Lewis,

I would favor option (iii), with the inclusion of the language contained in the rider to your memo.

Sincerely,

Bill

Justice Powell

COPIES TO THE CONFERENCE

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

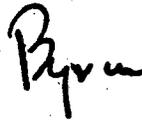
January 9, 1982

Re: 80-5887 - White v. New Hampshire
Department of Employment Security

Dear Lewis,

I join but would prefer not to leave
open the issue discussed in footnote 14.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 8, 1982

Re: 80-5887 - White v. New Hampshire

Dear Lewis

Like Bill Brennan, I favor option iii set out
in the rider to your February 4 memo.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 29, 1982

Re: No. 80-5887 - White v. New Hampshire Dept. of
Employment Security

Dear Lewis:

Please join me.

Sincerely,

JM.
T.M.

Justice Powell

cc: The Conference

~~LFP~~

~~I will go along with your
third option~~

JM

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1982

Re: No. 80-5887 - White v. New Hampshire Dept. of
Employment Security

Dear Lewis:

I will go along with your third option.

Sincerely,

JM.
T.M.

Justice Powell

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: JAN 19 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5887

RICHARD H. WHITE, PETITIONER, *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January —, 1982]

JUSTICE BLACKMUN, concurring.

I agree with much that has been said in the Court's opinion and I therefore concur, of course, in its judgment. I wish, however, that the Court had gone one step further.

We granted certiorari in this case, as the Court notes, *ante*, at 4, to resolve the existing conflict among the Courts of Appeals regarding post-judgment requests for attorney's fees under 42 U. S. C. § 1988. Three circuits have held that these fee requests are not within Fed. Rule Civ. Proc. 59(e), but are within the reach of Rules 54(d) and 58. Two have held that the requests are subject to Rule 59(e). And a sixth has held that such a request is not governed by *any* of the three rules. See *ante*, at 4 and 5, n. 9. The Court today settles the conflict so far as Rule 59(e) and its inapplicability to a fee request are concerned. But it leaves unanswered the applicability of Rules 54(d) and 58 because "this question is unnecessary to our disposition of this case." *Ante*, at 9, n. 17.

I would answer that question, and hold that Rules 54(d) and 58 also do not apply to post-judgment § 1988 fees requests. I believe that the federal courts and the lawyers that practice in them should have an answer so that we shall not have yet another case to decide before the correct proce-

LAP
Please give me
7/11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: JAN 5 1982

Recirculated: _____

FIRST DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5887

RICHARD H. WHITE, PETITIONER v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case arises from a post-judgment request for an award of attorney's fees under the Civil Rights Attorneys Fees Act of 1976, 42 U. S. C. § 1988, as amended. The question is whether such a request is a "motion to alter or amend the judgment," subject to the 10-day timeliness standard of Rule 59(e) of the Federal Rules of Civil Procedure.¹

I

This litigation began in March, 1976, when the petitioner Richard White filed suit against the respondent, the New Hampshire Department of Employment Security (NHDES). White claimed that the respondent failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating an applicable provision of the Social Security Act, 42 U. S. C. § 503(a)(1), the Due Process Clause of the Constitution of the United States, and 42 U. S. C. § 1983. Alleging federal jurisdiction under 42

¹ Rule 59(e) of the Federal Rules of Civil Procedure provides:

"(e) Motion to Alter or Amend a Judgment.

A motion to alter or amend a judgment shall be served not later than 10 days after entry of the judgment."

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 4, 1982

Re: No. 80-5887 - White v. New Hampshire
Department of Employment Security

Dear Lewis:

Contrary to the first sentence of the second paragraph of the memorandum of today, I did not join your opinion for the Court in this case.

I therefore suppose that my views as to your problem with note 14 are not very relevant. For what it may be worth, however, I would go for the second alternative, that is, omitting note 14, leaving a clear inference of finality and appealability. But I would have no great objection to the inclusion of your proposed explicit addition.

Sincerely,



Justice Powell

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 4, 1982

80-5887 White v. New Hampshire Dept. of Corrections

MEMORANDUM TO THE CONFERENCE:

The cert petition in Hommel Co. v. Ferro Corp., 81-1116 is on sheet 3, list 3 for the February 19 Conference. One of the issues is whether a DC's judgment that leaves undetermined the amount but not the award of attorney's fees is "final" for purposes of the 10-day filing period under Fed. Rule Civ. Proc. 50(b).

My opinion in White, joined by all of you, now reserves the closely related if not dispositive question whether such a judgment is "final" and therefore "appealable". See Note 14, page 8. As the resolution of this question was unnecessary to the decision in White, and was not argued by the parties, it had seemed desirable to leave it open.

In reflecting on the variety of "finality" issues now being presented, however, I have become increasingly "open" to the argument advanced by Byron and John.

My opinion in White characterizes the fee issue as "collateral" to the decision on the merits. If that question is collateral, it seems to follow that the merits decision is "independent" - and hence that the merits decisions are independently "final" and "appealable". If I left the footnote out entirely, my guess is that the conflict among the Circuits would be resolved fairly quickly on the foregoing reasoning. Alternatively, I think we have the option to decide the "finality" and "appealability" questions explicitly.

Thus, I submit a choice: (i) leave White as drafted, (ii) omit Note 14, leaving a clear inference of finality and appealability, or (iii) omit Note 14, but add an explicit note at the end of Section II.

In view of the votes for the opinion as drafted, there is a presumption against change. Yet, as we did not discuss the finality question and as it seems to recur with some frequency, there is a good deal to be said for resolving it now. If this should be the view of a majority, I would add a note along the lines of that attached hereto.

L.F.P.
L.F.P., Jr.

SS

DRAFT "FINALITY AND "APPEALABILITY" FOOTNOTE, for possible addition to the White draft at page 7, last line of Section II.

There is implicit support for this view in decisions of the courts of appeals holding that decisions on the merits may be "final" and "appealable" prior to the entry of a fee award. See, e.g., Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (CA6 1980); Hidell v. International Diversified Investments, 520 F.2d 529, 532 n. 4 (CA7 1975); see also Obin v. District 9, Intl. Assoc. of Machinists and Aerospace Workers, supra, 651 F.2d, at 583-584. If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining fee issue must be "collateral" to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as "final" and "appealable". Although "piecemeal" appeals of merits and fee questions generally are undesirable, we think district courts have ample authority to deal with this problem. See post, at 9 & n. 16.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 8, 1982

80-5887 White v. New Hampshire Department of
Employment Security

MEMORANDUM TO THE CONFERENCE

In my memorandum of February 4, I misspoke in saying that all of you had joined my opinion for the Court in this case.

I simply overlooked the fact that Harry had joined only the judgment.

L.F.P.
L.F.P., Jr.

LFP/vde

Stylistic changes throughout.

4-5, 7, 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: FEB 23 1982

SECOND DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5887

RICHARD H. WHITE, PETITIONER *v.*
NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case arises from a post-judgment request for an award of attorney's fees under the Civil Rights Attorneys Fees Act of 1976, 42 U. S. C. § 1988, as amended. The question is whether such a request is a "motion to alter or amend the judgment," subject to the 10-day timeliness standard of Rule 59(e) of the Federal Rules of Civil Procedure.¹

I

This litigation began in March, 1976, when the petitioner Richard White filed suit against the respondent, the New Hampshire Department of Employment Security (NHDES). White claimed that the respondent failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating an applicable provision of the Social Security Act, 42 U. S. C. § 503(a)(1), the Due Process Clause of the Constitution of the United States, and 42 U. S. C. § 1983. Alleging federal jurisdiction under 42

¹ Rule 59(e) of the Federal Rules of Civil Procedure provides:

"(e) *Motion to Alter or Amend a Judgment.*

A motion to alter or amend a judgment shall be served not later than 10 days after entry of the judgment."

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 23, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 80-5887, White v. New Hampshire Dept of Employment
Security

In the Second Circulated Draft of this case Footnote 15
should have been deleted.

A corrected copy will circulate shortly.

LFP

1 and 8
Footnote omitted,
other footnotes renumbered

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: FEB 24 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5887

RICHARD H. WHITE, PETITIONER *v.*
NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case arises from a post-judgment request for an award of attorney's fees under the Civil Rights Attorneys Fees Act of 1976, 42 U. S. C. § 1988, as amended. The question is whether such a request is a "motion to alter or amend the judgment," subject to the 10-day timeliness standard of Rule 59(e) of the Federal Rules of Civil Procedure.¹

I

This litigation began in March, 1976, when the petitioner Richard White filed suit against the respondent, the New Hampshire Department of Employment Security (NHDES). White claimed that the respondent failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating an applicable provision of the Social Security Act, 42 U. S. C. § 503(a)(1), the Due Process Clause of the Constitution of the United States, and 42 U. S. C. § 1983. Alleging federal jurisdiction under 42

¹Rule 59(e) of the Federal Rules of Civil Procedure provides:

"(e) *Motion to Alter or Amend a Judgment.*

A motion to alter or amend a judgment shall be served not later than 10 days after entry of the judgment."

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 22, 1982

Re: No. 80-5887 White v. New Hampshire Dept. of
Employment Security

Dear Lewis:

Please join me in your opinion for the Court.

Sincerely,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 9, 1982

Re: No. 80-5887 White v. New Hampshire

Dear Lewis:

For the reasons stated by Sandra in her letter of February 8th, I, too, would prefer to see your opinion left as it presently stands.

Sincerely,

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

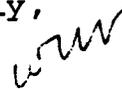
February 18, 1982

Re: No. 80-5887 White v. New Hampshire Dept. of
Corrections

Dear Lewis:

In response to your memo of February 4th, I favor the
third option.

Sincerely,



Justice Powell

Copies to the Conference

✓

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 5, 1982

Re: 80-5887 - White v. New Hampshire
Department of Corrections

Dear Lewis:

Your reasoning--with which I completely agree--that a fee award is separable from the judgment on the merits would seem to lead inescapably to the conclusion that the judgment on the merits is final and appealable even though the fee determination has not yet been made. I would favor making this point explicit rather than saving the question as you do in footnote 14 on page 8. Whether or not you adopt this suggestion, I join your opinion.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 17, 1982

Re: 80-5887 - White v. New Hampshire
Department of Corrections

Dear Lewis:

In responding to your memo of February 4, 1982, I would favor the third option. If that is not adopted, then I would favor the second.

Having held that the fee issue is collateral to the merits, I do not see how any other result on the appealability question could be justified. It would seem unfortunate to use up any of our scarce argument time on this issue.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 11, 1982

No. 80-5887 White v. New Hampshire Dept.
of Employment Security

Dear Lewis,

Please join me in your opinion in the
referenced case.

Sincerely,



Justice Powell

Copies to the Conference

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

February 8, 1982

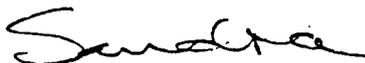
No. 80-5887 White v. New Hampshire

Dear Lewis,

Because of my reluctance to foreclose a decision that a judgment on the merits is not final when attorneys fees are still not determined, I tend to believe we should leave the opinion as it is and consider granting cert in Hommel Co. v. Ferro Corp.

However, I will not withdraw my joinder if you follow option iii as proposed in your memo of February 4.

Sincerely,



Sandra D. O'Connor

Justice Powell

Copies to the Conference