

# The Burger Court Opinion Writing Database

## *Bowen v. Postal Service*

459 U.S. 212 (1983)

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



PERSONAL

November 23, 1982

Re: No. 81-525, Bowen v. United States Postal Service

Dear Lewis:

I join.

Regards,

P.S. It seems to me that the final two sentences, first full paragraph p.7 would be clearer to me if it read, with the new underlined language, as follows:

"This reading of Vaca fails to recognize that a collective-bargaining agreement is much more than traditional common law employment terminable at will. Rather, it is an agreement creating relationships and interests under federal law and federal labor policy.

I will join in any case but these changes will make this part more consistent with Part B, p 11.

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

CHAMBERS OF  
THE CHIEF JUSTICE

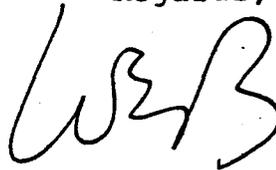
December 9, 1982

RE: 81-525 - Bowen v. United States Postal Service

Dear Lewis:

This will confirm my earlier informal "join".

Regards,

A handwritten signature in dark ink, appearing to be 'WBP', 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.

November 15, 1982

Re: Bowen v. U.S. Postal Service, No. 81-525

Dear Lewis:

Thank you for giving me the opportunity to look at your draft in the above case before formal circulation. I have read it carefully, and I quite agree with it. I do, however, have a suggestion for your consideration.

I think that it may be something of a tactical error to frame the issue in terms of liability for "backpay". In one sense, of course, this is a simple recognition of the actual nature of the remedy in this case. But in another sense, the damages for which the union is liable are not exactly "backpay" as that term is usually used. Backpay generally refers to an award against a defendant for the compensation which that defendant ought to have paid; thus, there is some rhetorical appeal to the idea that "Traditionally, the Union does not pay wages" (p.2 n.3). Rather, the union's liability is more akin to damages for earnings lost due to some independent tort, such as would be awarded in an ordinary negligence suit arising out of a traffic accident. A traffic defendant

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 19, 1982

RE: No. 81-525 Bowen v. U.S. Postal Service

Dear Lewis:

Thanks so much for the revised opinion. I can, and will, enthusiastically join when you circulate. I am delighted that the suggestions in my letter of November 15 were helpful.

Sincerely,

*Bill*

Justice Powell

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 22, 1982

RE: No. 81-525 Bowen v. U.S. Postal Service

Dear Lewis:

I agree.

Sincerely,

*Bill*  
7

Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 7, 1982

Re: Bowen v. Postal Service, No. 81-525

Dear Lewis:

I am delighted at the changes you have made in consultation with John. I entirely agree that the changes strengthen our views.

Sincerely,



WJB, Jr.

Justice Powell

Copy to Justice Stevens

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 20, 1982

Re: 81-525 -

Bowen v. United States Postal Service

Dear Lewis,

In due course, I shall dissent.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

.65 . . . 65

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

From: Justice White

Circulated: 23 NOV 1982

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~~BAW  
Please join me  
in your opinion  
JW~~

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-525

**CHARLES V. BOWEN, PETITIONER v. UNITED STATES POSTAL SERVICE ET AL.**

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

[November —, 1982]

JUSTICE WHITE, concurring in part in the judgment and dissenting in part.

The Court holds that an employer who wrongfully discharges an employee protected by a collective bargaining agreement with an arbitration clause is only responsible for backpay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration. All backpay damages that accrue after this time are the sole responsibility of the union, even where, as here, the union is no way responsible for the employer's decision to terminate the employee. This rationale, which heretofore has been rejected by every Court of Appeals that has squarely considered it,<sup>1</sup>

<sup>1</sup>In addition to the opinion below in the present case, *Bowen v. Postal Service*, 642 U. S. 79 (CA4 1981), see *Seymour v. Olin Corp.*, 666 F. 2d 202 (CA5 1982); and *Milstead v. Teamsters*, 649 F. 2d 395 (CA6 1981), cert. denied, — U. S. — (1982). See also *Wyatt v. Interstate & Ocean Transport Co.*, 623 F. 2d 888 (CA4 1980). The Court erroneously states, ante, at 6 n. 8, that the circuit courts are split. Quite the contrary, all cases cited by the Court support the view advanced in this dissent. In *Soto Segura v. Sea-Land Service, Inc.*, 581 F. 2d 291, 298 (CA1 1978), the First Circuit specifically noted that, in accordance with *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Czosek v. O'Mara*, 397 U. S. 25 (1970), the District Court "did not charge the union for any of the back pay due appellee but instead awarded \$5,750 in attorney's fees proximately caused by the

11/23  
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W-13  
re  
join  
Join

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

From: Justice White

Pp. 1, 2, 6, 8, 10, 12, 13

Circulated: \_\_\_\_\_

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-525

CHARLES V. BOWEN, PETITIONER *v.* UNITED STATES POSTAL SERVICE ET AL.

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

[December —, 1982]

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST (except as to part IV), join concurring in part in the judgment and dissenting in part.

The Court holds that an employer who wrongfully discharges an employee protected by a collective bargaining agreement with an arbitration clause is only responsible for backpay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration. All backpay damages that accrue after this time are the sole responsibility of the union, even where, as here, the union is no way responsible for the employer's decision to terminate the employee. This rationale, which heretofore has been rejected by every Court of Appeals that has squarely considered it,<sup>1</sup>

<sup>1</sup>In addition to the opinion below in the present case, *Bowen v. Postal Service*, 642 U. S. 79 (CA4 1981), see *Seymour v. Olin Corp.*, 666 F. 2d 202 (CA5 1982); and *Milstead v. Teamsters*, 649 F. 2d 395 (CA6 1981), cert. denied, — U. S. — (1982). Also consistent with the view advanced in this dissent are *Wyatt v. Interstate & Ocean Transport Co.*, 623 F. 2d 888 (CA4 1980) (assessing the employer for all backpay); and *Soto Segura v. Sea-Land Service, Inc.*, 581 F. 2d 291, 298 (CA1 1978), where the First Circuit specifically noted that, in accordance with *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Czosek v. O'Mara*, 397 U. S. 25 (1970), the District Court

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JUSTICE MARSHALL

'82 DEC 35 P1:33 pp. 1-2 and Stylistic

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

From: Justice White

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-525

CHARLES V. BOWEN, PETITIONER *v.* UNITED  
STATES POSTAL SERVICE ET AL.

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

[December —, 1982]

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST (except as to part IV), join concurring in part in the judgment and dissenting in part.

The Court holds that an employer who wrongfully discharges an employee protected by a collective bargaining agreement with an arbitration clause is only responsible for backpay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration. All backpay damages that accrue after this time are the sole responsibility of the union, even where, as here, the union is no way responsible for the employer's decision to terminate the employee. This rationale, which heretofore has been rejected by every Court of Appeals that has squarely considered it,<sup>1</sup>

<sup>1</sup> In addition to the opinion below in the present case, *Bowen v. Postal Service*, 642 U. S. 79 (CA4 1981), see *Seymour v. Olin Corp.*, 666 F. 2d 202 (CA5 1982); and *Milstead v. Teamsters*, 649 F. 2d 395 (CA6 1981), *cert. denied*, — U. S. — (1982). These three are the only circuit court decisions rendering square holdings on the issue. However, also consistent with the view advanced in this dissent are *Wyatt v. Interstate & Ocean Transport Co.*, 623 F. 2d 888 (CA4 1980) (assessing the employer for all backpay); and *Soto Segura v. Sea-Land Service, Inc.*, 581 F. 2d 291, 298 (CA1 1978), where the First Circuit specifically noted that, in accordance

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 9, 1982

Re: No. 81-525 - Bowen v. United States Postal Service

Dear Byron:

Please join me in your opinion.

Sincerely,



T.M.

Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 26, 1982

Re: No. 81-525 - Bowen v. United States Postal Service

Dear Byron:

Please join me in your opinion concurring in part in  
the judgment and dissenting in part.

Sincerely,



Justice White

cc: The Conference

November 16, 1982

81-525 Bowen v. U.S. Postal Service

Dear Bill:

I so much appreciate your letter making suggestions for changes of emphasis and language in my draft opinion. Your suggestions are consistent in substance with my views, and I will undertake revisions and submit them to you before circulation.

You are quite right that we avoid use of the term "backpay" in referring to union liability. Also, I agree that where the union itself is unable to respond to a finding of primary liability (e.g. is bankrupt), the employer remains liable for backpay.

It does seem to me that our "bottomline" holding should be --as you and I both argued at Conference -- reinstatement of the judgment of the District Court. There can be no doubt that the union is liable here. This is established by the jury's findings, approved by the District Court, and accepted by the Court of Appeals.

Again my warm thanks.

Sincerely,

Justice Brennan

Copies to the Conference

LFP/vde

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

From: Justice Powell

Circulated: 11/20/82

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-525

**CHARLES V. BOWEN, PETITIONER v. UNITED STATES POSTAL SERVICE ET AL.**

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

[November —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.

I

On February 21, 1976, following an altercation with another employee, petitioner Charles V. Bowen was suspended without pay from his position with the United States Postal Service. Bowen was a member of the American Postal Workers Union, AFL-CIO, the recognized collective bargaining agent for Service employees. After Bowen was formally terminated on March 30, 1976, he filed a grievance with the Union as provided by the collective-bargaining agreement. When the Union declined to take his grievance to arbitration, he sued the Service and the Union in the United States District Court for the Western District of Virginia, seeking damages and injunctive relief.

Bowen's complaint charged that the Service had violated the collective bargaining agreement by dismissing him without "just cause" and that the Union had breached its duty of fair representation. His evidence at trial indicated that the responsible Union officer, at each step of the grievance process, had recommended pursuing the grievance but that the

CHANGES PAGES 6, 7, 11-13

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

From: **Justice Powell**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-525

**CHARLES V. BOWEN, PETITIONER v. UNITED STATES POSTAL SERVICE ET AL.**

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

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.

I

On February 21, 1976, following an altercation with another employee, petitioner Charles V. Bowen was suspended without pay from his position with the United States Postal Service. Bowen was a member of the American Postal Workers Union, AFL-CIO, the recognized collective bargaining agent for Service employees. After Bowen was formally terminated on March 30, 1976, he filed a grievance with the Union as provided by the collective-bargaining agreement. When the Union declined to take his grievance to arbitration, he sued the Service and the Union in the United States District Court for the Western District of Virginia, seeking damages and injunctive relief.

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November 24, 1982

81-525 Bowen v. U.S. Postal Service

Dear John:

I appreciate a great deal your personal letter.

The Court's prior opinions, that I have examined with some care, certainly can be read both ways in this case. The one exception, however, is the explicit statement in Vaca of the "governing principle" (my opinion, p. 5). Byron never really confronts this. Moreover, as noted on p. 10 of my opinion, Byron's view would read out of the governing principle the critical language.

Apart from this, however, I agree with you that Byron's position "simply cannot be correct" because of its bizarre result. As you put it, it would allow the union and the employee in every three-cornered fight over backpay to make a deal. In addition, the dissent's rule is incompatible with labor law policy.

Byron argues that the employer is solely liable for backpay because it always is in a position to avoid extended liability simply by rehiring the employee. If this were the rule, it would make a mockery of the grievance procedure itself. Its purpose is to resolve differences of opinion between employer and employee. Moreover, and along the lines of your observation, Byron's rule would leave an employer with the dubious option of (i) rehiring promptly the fired employee, or (ii) allowing the union solely by its action or inaction to extend the period for which backpay is due. This is precisely what the union did in this case.

Although my opinion would hold that the union's fault justifies requiring it to be primarily responsible for a portion of the employee's damages, I leave open the definition of that portion. Footnote 18 was intended both to narrow the scope of the holding and to leave room for future development. Byron overstates the scope of our holding.

I am making some responses to Byron, including emphasis on the dilemma that his position puts on an employer and the extent to which the policy favoring arbitration would be frustrated.

I add that I talked to Bill Brennan about this case and tried to write it consistently with his views, making clear that the employee has an enforceable claim against both the employer and the union.

Sincerely,

Justice Stevens

lfp/ss

November 29, 1982

81-525 Bowen v. U.S. Postal Service

Dear John:

In thinking further about what seems to be the rather narrow difference of opinion between us, could we perhaps bridge this gap by the following changes: At the end of footnote 3, add:

"The union's failure to object to the District Court's apportionment instructions, as to the measuring point of the parties' respective liability, precludes it from arguing now that a different method of apportionment would have been equitable."

I would add in the final footnote of my opinion (n. 18 in the first draft), a cross reference to n. 3, supra.

I also would change the first sentence in note 12 to read as follows:

"Although the union remains primarily responsible for the portion of the damages found by the DC in this case to be attributable to its default, Vaca made clear that the union's breach does not absolve the employer of liability."

In response to Byron's dissent, I would add a new footnote to page 13, which will include the following paragraph:

"When the union has breached its duty of fair representation, the dissent justifies its rule by arguing that 'only the employer ha[s] the continuing ability to right the wrong by reinstating' the employee, an ability that the union lacks. See post, at

9. But an employer has no way of knowing that a failure to carry a grievance to arbitration constitutes a breach of duty. Rather than rehiring, as the dissent suggests, the employer reasonably could assume that the union had concluded the discharge was justified. The union would have the option, if it realized it had committed an arguable breach of duty, to bring its default to the employer's attention. Our holding today would not prevent a jury from taking such action into account. See infra, n. 20."

At this point I have joins from Bill Brennan and Sandra. The Chief has told me he also will join. Sandra is reluctant to acknowledge that even a secondary liability remains on the employer. She is inclined to view the union's breach as a supervening cause that should relieve the employer completely of liability.

Thus, we are in a position where a Court opinion depends on some giving by several of us. I have not discussed this with the other Justices, but if the changes suggested above have your approval I will submit the changes to them. I believe these changes will leave the issue open for further development in the future.

Sincerely

Justice Stevens

lfp/ss

December 4, 1982

81-525 Bowen v. U.S. Postal Service

Dear John:

Again I thank you for your letter of November 30, and particularly appreciate your devoting thought and time to my problem in the middle of an argument week.

As I said to you on the bench, I agree entirely with your view, and think you have expressed it with force and clarity.

I have incorporated its substance in the enclosed Rider A to be inserted on page 12 of my opinion, also enclosed. I have not tracked your language 100%, but I think the substance - plus most of your language - is included.

I am confident that Sandra will be particularly pleased, and I anticipate that the Chief also will think this strengthens the opinion. I do think it prudent to show the new language to Bill Brennan, but want to be sure that you approve of the way I have incorporated your views.

With your addition in the text of the opinion, I do not think it is necessary to make the changes mentioned in my letter to you of November 29, except the change in n. 16.

As I believe Bill Brennan will approve, I am now optimistic - thanks to you - that we will have a Court.

Sincerely,

Justice Stevens

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 7, 1982

81-525 Bowen v. U.S. Postal Service

Dear Bill:

I have joins from you and Sandra, and the Chief - as he sometimes does - has told me verbally that he will join - though I have no formal confirmation.

The uncertain vote, necessary for a Court, has been that of John Stevens.

John and I have had several exchanges, and he is now with us. He suggested language that would make clearer the right of an employer to rely on the union's control of the grievance procedure. I enclose a copy of my second draft, including a proposed Rider A to be added at the place indicated on page 12. This embodies language the substance of which was suggested by John.

I think it is entirely compatible with our views, and may indeed - as John thinks - strengthen them.

But before recirculating, I want to make sure that you agree.

Sincerely,



Justice Brennan

lfp/ss

CHANGES PAGES 6, 7, 11-13

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

DEC 7 1982

From: Justice Powell

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Recirculated: DEC 8 1982

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-525

**CHARLES V. BOWEN, PETITIONER v. UNITED STATES POSTAL SERVICE ET AL.**

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

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.

I

On February 21, 1976, following an altercation with another employee, petitioner Charles V. Bowen was suspended without pay from his position with the United States Postal Service. Bowen was a member of the American Postal Workers Union, AFL-CIO, the recognized collective bargaining agent for Service employees. After Bowen was formally terminated on March 30, 1976, he filed a grievance with the Union as provided by the collective-bargaining agreement. When the Union declined to take his grievance to arbitration, he sued the Service and the Union in the United States District Court for the Western District of Virginia, seeking damages and injunctive relief.

Bowen's complaint charged that the Service had violated the collective bargaining agreement by dismissing him without "just cause" and that the Union had breached its duty of fair representation. His evidence at trial indicated that the responsible Union officer, at each step of the grievance process, had recommended pursuing the grievance but that the

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changes pages 12, 13

DEC 9 1982

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

From: Justice Powell

Circulated: \_\_\_\_\_

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-525

CHARLES V. BOWEN, PETITIONER *v.* UNITED STATES POSTAL SERVICE ET AL.

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

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.

### I

On February 21, 1976, following an altercation with another employee, petitioner Charles V. Bowen was suspended without pay from his position with the United States Postal Service. Bowen was a member of the American Postal Workers Union, AFL-CIO, the recognized collective bargaining agent for Service employees. After Bowen was formally terminated on March 30, 1976, he filed a grievance with the Union as provided by the collective-bargaining agreement. When the Union declined to take his grievance to arbitration, he sued the Service and the Union in the United States District Court for the Western District of Virginia, seeking damages and injunctive relief.

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DEC 29 1982

CHANGES PP 6-7

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

From: Justice Powell

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4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-525

**CHARLES V. BOWEN, PETITIONER v. UNITED STATES POSTAL SERVICE ET AL.**

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

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.

I

On February 21, 1976, following an altercation with another employee, petitioner Charles V. Bowen was suspended without pay from his position with the United States Postal Service. Bowen was a member of the American Postal Workers Union, AFL-CIO, the recognized collective bargaining agent for Service employees. After Bowen was formally terminated on March 30, 1976, he filed a grievance with the Union as provided by the collective-bargaining agreement. When the Union declined to take his grievance to arbitration, he sued the Service and the Union in the United States District Court for the Western District of Virginia, seeking damages and injunctive relief.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 23, 1982

Re: No. 81-525 Bowen v. United States Postal Service

Dear Byron:

Please join me in Parts I, II, and III of your dissent.

Sincerely,



Justice White

cc: The Conference

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

From: **Justice Rehnquist**

Circulated: JAN 3 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-525

**CHARLES V. BOWEN, PETITIONER v. UNITED STATES POSTAL SERVICE ET AL.**

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

[January —, 1983]

JUSTICE REHNQUIST, dissenting.

I have joined Parts I, II, and III of JUSTICE WHITE's dissenting opinion. However I have some doubt about the proposition advanced by Part IV of the dissent and by the Court, *ante*, at 5, n. 7.

The District Court entered judgment for Bowen in the amount of \$52,954. It apportioned \$30,000 of this amount against the Union, and \$22,954 against the Postal Service. When it reversed the judgment against the Union, the Court of Appeals declined to increase the award against the Postal Service or to remand for a new trial. Because this Court has reversed the judgment of the Court of Appeals, its assertion that Bowen "should not have been deprived of the full amount of his compensatory damages because of his failure to cross appeal," *id.*, is *dictum*. Although the issue is not before us, I am writing separately to express my doubts about the soundness of this proposition.

The District Court observed that "there is authority suggesting that only the employer is liable for damages in the form of back pay", *ante*, at 4, and the decisions of the Courts of Appeals discussed both by Justice White's opinion and the Court's opinion show at the very least that there was substantial doubt that a union could be held liable for damages such as those awarded by the District Court. Under these

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 22, 1982

Re: 81-525 - Bowen v. United States  
Postal Service

Dear Lewis:

Although I am quite sure I will end up in your corner, I think I will wait to see what Byron writes before finally coming to rest.

Respectfully,



Justice Powell

Copies to the Conference

85 33 11 83

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

*all -  
attach my  
answer of  
11/24, 8 Feb*

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 23, 1982

Re: 81-525 - Bowen v. United States  
Postal Service

Dear Lewis:

*Yes*

If it were necessary to hold that either the employer or the union is primarily liable and that the other is only secondarily liable for backpay, I think Byron would have the better of the argument. At the very least, the language in the Court's prior opinions seems to lend more support to his position than to yours. I remain convinced, however, that his position simply cannot be correct because it would allow the union and the employee in every three-cornered fight over backpay to agree on a settlement pursuant to which the union would acknowledge a breach of its duty of fair representation in exchange for the employee's undertaking to look to the employer for his entire recovery. I think you are correct in your view that the employer, as well as the union membership, has a right to rely on the union's duty to provide good faith representation in disputed discharge cases.

It seems to me that the correct answer lies somewhere in between the polar positions that you and Byron take. This is a sort of common law area in which the Court may properly fashion the rule that it believes most consistent with national labor policy, subject always to legislative oversight. I should think in the usual case, absent facts that would place special responsibility on either the union or the employer, that they should bear equal responsibility for backpay during the post-hypothetical-arbitration-date period. Whether that would be best accomplished by separate liability in equal parts, by joint and several liability with a right of contribution, or by merely leaving the decision to the equitable discretion of the fact finder, is a matter on which I have some doubt. In this case, however, since the Union took an "all or nothing" position in its

*The facts here de*

objections to the jury instructions, I am not sure the point needs to be resolved in order to reinstate the District Court's judgment.

What all of this means is that I presently do not believe I can join your opinion as now written. If you adhere to your position placing primary liability on the Union, I will try my hand at a separate concurrence. If you would prefer to recast your opinion along the lines suggested in this letter, I will of course await your revision.

I should add that I have written this letter simply on the basis of my reading of your respective drafts. Further study may unsettle me even more because I find this to be a very hard case.

Respectfully,



Justice Powell

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 30, 1982

Re: 81-525 - Bowen v. United States  
Postal Service

Dear Lewis:

Since talking to you yesterday I have given this case further study. It now occurs to me that we may not have placed sufficient emphasis on the peculiar character of the collective bargaining relationship in which the union has the sole right to act on behalf of its members. This point is not explicitly made in Potter's concurrence in Hines, but is thoroughly consistent with it and also emphasizes the validity of your distinction of Czosek, a case in which the employee had a statutory right to process his grievance independently of the union. I wonder if you might consider inserting a paragraph or two expressing this general idea:

"The employer not only has the right--it has the duty--to treat the union as the employee's exclusive representative in virtually all matters concerning the terms and conditions of employment. This is true with respect to matters relating to the creation, the performance, and the termination of the employment relationship. Just as an unorganized employer may accept an employee's waiver of any challenge to a discharge decision as a final resolution of the matter, so should an organized employer have the right to accept as final a comparable waiver by the employee's exclusive bargaining representative.

"There is no unfairness to the union in this approach. By seeking and acquiring the exclusive right and power to speak for a group of employees,

the union assumes a corresponding duty--a duty that it owes both to the employees whom it represents and to the employer with whom it bargains--to discharge that responsibility faithfully. When the union--acting as the agent of an employee--waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee himself had so acted in a situation in which he had the right to represent himself. Indeed, arguably, the employer should have a greater right to rely on the finality of a union decision because there is less risk of over-reaching when an employee is represented by a union than when he represents himself."

As I am sure you will recognize, these thoughts are rather hastily expressed and are somewhat inconsistent with the views I set forth in my most recent letter to you. I am inclined to think, however, that your opinion would be strengthened by including the substance of this thought and also by making reference to Potter's concurrence in Hines.

I have no problem with any of the changes you proposed to me yesterday.

If you would rather not rock the boat by making the kind of change I am suggesting, perhaps I could simply join you and make this point in a brief separate concurrence. I would much prefer, however, not to write separately.

Respectfully,



Justice Powell

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

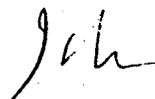
December 8, 1982

Re: 81-525 - Bowen v. United Postal Service

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 22, 1982

No. 81-525 Bowen v. United States Postal  
Service

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Dear Lewis,

Please join me.

Sincerely,



Justice Powell

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