Finality in the Fourth Circuit

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Pretrial orders that dismiss all claims in an action and enter judgment in favor of a defendant are unquestionably final, appealable orders for purposes of 28 U.S.C. § 1291. *See, e.g.*,*Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 253 (3d Cir. 2004) (finding order granting motion for judgment on the pleadings is final order). The issue becomes less clear in cases in which a district court dismisses a complaint for failure to state a claim *without prejudice*. In instances where the dismissal order is based on a plaintiff?s failure to plead sufficient facts and leaves open the possibility of an amended complaint that could rectify that failure, the Fourth Circuit recently clarified that it does not consider these orders final for purposes of appealability.

The plaintiff in *Goode v. Central Virginia Legal Aid Society, Inc.*, 807 F.3d 619 (4th Cir. 2015), Freddie Lee Goode, is a 72-year-old African American who served for decades as a senior managing attorney for the Central Virginia Legal Aid Society (CVLAS). In March 2013, CVLAS?s board of directors eliminated Goode?s position, triggering his filing of a lawsuit based on claims of race, sex, and age discrimination. *See id.* at 621. CVLAS filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion on grounds that Goode had failed either (1) to present direct or circumstantial evidence of discrimination or (2) to make out a prima facie case of discrimination under the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Goode*, 807 F.3d at 622. The district court dismissed the case without prejudice but was silent on whether it was granting Goode leave to amend. Goode appealed.

The Fourth Circuit held that it lacked jurisdiction to consider Goode?s appeal. The court began by noting that ?[a]n order dismissing a complaint without prejudice is not an appealable final order under § 1291 if ?the plaintiff could save his action by merely amending his complaint.?? *Id.* at 623 (quoting *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066?67 (4th Cir. 1993)). Thus, a plaintiff may not appeal a dismissal of the complaint without prejudice unless the district court?s order makes clear that no amendment could cure the defects in the plaintiff?s case. This requires the appellate court to conduct a case-by-case analysis of each dismissal order to discern whether the order

?end[s] the litigation on the merits and leave[s] nothing for the court to do but execute the judgment.?*Id.* (quotation marks and citation omitted).

The court then provided several examples of complaints dismissed by district courts because of procedural deficiencies that no amendment could cure. The court?s list included cases in which the district court found that plaintiffs had failed to exhaust contractual remedies, had no legal right to bring an action, or were time-barred by the applicable statute of limitations. *Id.* at 624.

The court contrasted these cases with those involving dismissals for a plaintiff?s failure to plead sufficient facts. In those cases, unless the district court?s opinion indicated otherwise, the appellate court could assume that the deficiencies were curable through amendment.

Applying this reasoning, the court recounted that the district court?s order granting the motion to dismiss was based on Goode?s failure to plead sufficient facts to state a claim and the district court?s order did not clearly indicate that no amendment could cure the pleading?s deficiencies. The court rejected Goode?s argument that he was ?not afforded the ability to amend his complaint,? noting that Goode had never requested leave to amend his pleading*Id.* at 628. The court surmised that, had Goode sought leave, ?the district court surely would have granted [the] motion, given the liberal standard that governs a request to amend a complaint under Federal Rule of Civil Procedure 15(a)(2).?*Id.*

The court ultimately dismissed the appeal with instructions to the district court to allow Goode an opportunity to amend his complaint. *See id.* at 630.

Goode clarified that in the Fourth Circuit an order dismissing a case without prejudice based on a failure to plead sufficient facts to state a claim is not appealable. The court presented this rule as a corollary of the liberal amendment policy afforded by the Federal Rules of Civil Procedure.

The Fourth Circuit, however, has not addressed the related issue of whether a plaintiff who has the option of seeking leave to amend can instead create finality?and an immediate appeal?by making an express election to stand on his or her pleading. *See, e.g.*, *Kittay v. Kornstein*, 230 F.3d 531, 541 n.8 (2d Cir. 2000) (finding Rule 12(b)(6) order final where plaintiff expressly disclaimed the opportunity to amend); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 31?32n.3 (3d Cir. 2011) (finding ?failure to amend his complaint in the time frame allotted by the District Court reflects his intention to stand on his complaint, which renders the District Court?s order final as to [those two defendants] for purposes of § 1291?). Arguably, a plaintiff?s decision to file an appeal rather than move to amend is itself an election to stand on the complaint and an express waiver of any right to amend the pleading.*See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1244 n.1 (11th Cir. 2005) (per curiam) (?Because Plaintiffs filed their notice of appeal before the time to amend expired, they waived the right to amend later the complaint; and the dismissal became final for appeal purposes.?). The Fourth Circuit will likely face this issue in future cases.

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