

In an En Banc Decision, the Fourth Circuit Clarifies the Appealability of Dismissals Without Prejudice - *Britt v. DeJoy*

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In its *en banc* opinion last month, the United States Court of Appeals for the Fourth Circuit held that where a district court dismisses a case without prejudice but is silent about allowing leave to amend, the dismissal is considered a final, appealable order under 28 U.S.C. § 1291. *Britt v. DeJoy*, No. 20-1620, 2022 WL 3590436 (4th Cir. Aug. 17, 2022) (*en banc*). Prior to *Britt*, the Fourth Circuit had adopted a case-by-case approach which meant that the appellate court was charged to review the proceedings below to determine whether the district court was truly finished with the case or whether an amendment to the complaint was viable. *Britt* eliminated the “confusion” that the case-by-case approach had sown, replacing it with a “clear bright-line” set of rules. *Id.* at *4.

1. Summary Of The Facts

Appellant Joann Britt, a former employee of the United States Postal Service (“USPS”) brought employment discrimination and retaliation claims against her employer. USPS moved to dismiss the complaint and, with the exception of the retaliation claim, the district court dismissed all of Britt’s claims *with prejudice*. The court dismissed the retaliation claim *without prejudice* after finding that Britt did not plead a causal link between her protected activity and her termination. Although the deficiencies in her complaint were not fatal, the court did not grant Britt leave to amend. [In fact, the district court record indicates that Britt made no request to amend.] Nonetheless the court directed the Clerk of Court to “close the case.” Britt appealed the dismissal and the Fourth Circuit decided to consider *en banc* the “issue of when a dismissal without prejudice is final, and thus appealable.” *Id.* at *2.

2. Discussions

The Fourth Circuit began its discussion stating that it is “well-established that dismissals made without prejudice when leave to amend is denied are final and appealable, and it is equally well-established that dismissals made without prejudice when leave to amend is granted are not.” *Id.* at *4. But, the Court asked, “what happens when a district court dismisses a complaint or all claims within a complaint without prejudice yet remains silent as to the possibility of amendment?” *Id.* To resolve the issue, the Court abandoned its previous case-by-case approach, and instead joined the D.C. and other Circuits by adopting a bright-line rule to the effect that anything less than an express invitation to amend is not a clear enough signal to overcome the presumption of finality. *Id.* at *5. The Fourth Circuit reasoned that “[a]ny and all intent regarding finality... is communicated through

the presence or lack of permission to amend the complaint.” *Id.* Without such permission expressly granted, the dismissal is final and appealable.

Notwithstanding this new standard, the Fourth Circuit admitted that some confusion could still remain under several different circumstances. The Court, therefore, set forth several scenarios and explained how a party should proceed to maintain a timely right to appeal. *Id.*

a. The District Court Dismisses a Complaint Without Prejudice and Without Expressly Granting Leave to Amend – When Does the Time to Appeal Begin to Run If the Plaintiff Wants to Amend the Complaint?

As noted under the new rule, where the district court's order is without prejudice but does not address the ability to amend, the decision is appealable. If, however, the party wishes to amend the complaint, the Court explained that the time to appeal begins to run upon entry of the judgment after amendment. In this instance the plaintiff can only amend its complaint by first filing a motion to reopen or to vacate the judgement under Rule 59 or Rule 60. *Id.* at *5. Once this motion is filed, the time to appeal will restart from the entry of the order disposing of the last such remaining motion. *Id.*

b. The District Court Grants a Plaintiff Leave to Amend but Plaintiff Chooses Not to Amend – How May the Plaintiff Obtain the Right to Appeal?

If a plaintiff wishes to stand on the complaint when a district court expressly grants leave to amend, the decision would not be final and, thus, not appealable. *Id.* at *6. In this circumstance, a plaintiff who wishes to stand on the complaint should request that the district court enter a final decision dismissing the case without leave to amend. *See* Fed. R. Civ. P. 59. Once the district court issues the new decision constituting a final judgment, the appeal clock will begin to run, and the plaintiff may then appeal. *DeJoy*, 2022 WL 3590436, at *6.

c. The District Court Grants Leave to Amend and Either Specifies or Does Not Specify the Deadline for the Amendment – What are the Deadlines for an Appeal?

In granting a plaintiff leave to amend the complaint, the district court may have: (1) provided the plaintiff with a specified number of days in which to amend, or (2) remained silent as to a deadline for amendment. Because, on its face, either type of order is not final (by virtue of the possibility for amendment of the complaint), the Fourth Circuit held that in both instances the plaintiff must obtain a final order before being able to appeal.

In the first instance, where the district court has indicated how much time the plaintiff has to amend the complaint, that deadline must be met and an appeal would be possible at a later time when the amended complaint is ruled upon. However, if no amendment is filed by the deadline, the district court should issue a final order upon the deadline's expiration whereupon the time to appeal begins to run. *Id.* Citing an old Supreme Court case, the Fourth Circuit opined that absent an order from the district court, the time to appeal would not run – even if the plaintiff fails to amend or fails to file the amendment on time. *Id.* at *6 (citing *Jung v. K. & D. Min. Co.*, 356 U.S. 335, 337, (1958) (finding that a plaintiff who was granted twenty days to amend obtained a final, appealable decision when electing to stand on her complaint nearly two years later)). In the second instance where no amendment deadline is set, a plaintiff electing to stand on the complaint can affirmatively waive the right to amend by requesting, and obtaining, a final decision from the district court. *Id.*

3. Conclusion

The Fourth Circuit concluded that an order dismissing a complaint without prejudice but without expressly granting leave to amend is final. In Britt's case, the Fourth Circuit found that her appeal

was from a final order thus clearing the way for an ultimate appellate decision on the merits. *Id.* at *7.