RECORD NO. 20-1620

In The
United States Court of Appeals
For The Fourth Circuit

JOANN D. BRITT,

Plaintiff – Appellant,

v.

LOUIS DEJOY, Postmaster General,

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE**

SUPPLEMENTAL OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
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No. 20-1620 Caption: JoAnn D. Britt v. Megan J. Brennan, Postmaster General

Pursuant to FRAP 26.1 and Local Rule 26.1,

JoAnn D. Britt
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Daniel L. Cox Date: June 9, 2020

Counsel for: JoAnn D. Britt

Print to PDF for Filing Reset Form

Table of Contents

Page

Table of Authorities ii

Procedural Status 1

Factual Averments Pertinent to Supplemental Briefing 1

Summary of Argument 2

Argument 3

I. The Order of Dismissal Was a Final Order and the Court of Appeals Has Jurisdiction 3

II. The Court Should Adopt the Sixth Circuit Rule of Procedure 6

Conclusion 11

Request for Oral Argument by Remote Appearance 11

Certificate of Compliance

Certificate of Filing and Service

Table of Authorities

Page(s)

Cases

Azar v. Conley,
480 F.2d 220 (6th Cir. 1973) 7

Cobbledick v. *United States*,
309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 460 (1940) 3, 7, 8

Dearth v. Mukasey,
516 F.3d 413 (6th Cir. 2008) 7

Domino Sugar Corp. v. Sugar Workers Local Union 392 of United Food and Commercial Workers Intern. Union,
10 F.3d 1064 (4th Cir. 1993) 4, 6

Elfenbein v. Gulf & Western Industries, *Inc*.,
590 F.2d 445 (2d Cir. 1978) 7, 8

In re Ferro Corp. Derivative Litigation,
511 F.3d 611 (6th Cir. 2008) 5, 7

United States v. Wallace Tiernan Co.,
336 U.S. 793, 69 S. Ct. 824, 93 L. Ed. 1042 (1949) 4

Statute

28 U.S.C. § 1291 7

Rules

Fed. R. Civ. P. 4 ....2, 4, 10

Fed. R. Civ. P. 4(a)(1) 10

Fed. R. Civ. P. 54(b) 9

Other Authority

9 Moore's Federal Practice P 110.08(1) 8

Procedural Status

Your appellant made her complaint with the EEOC on May 3, 2017. She then later received her right to sue letter and filed her complaint upon three counts, Violation of the Rehabilitation Act, Title VII Age Discrimination in Employment, and Hostile Workplace and Retaliation, with the United States District Court for the District of Maryland on February 10, 2019. On April 8, 2020 the District Court, the Honorable Judge Richard D. Bennett presiding, dismissed with prejudice all three counts and the action itself, while dismissing without prejudice a portion of the retaliation claim under Count III. On the same date, April 8, 2020, Judge directed the case to be closed, dismissing the entire action. On June 1, 2020 Appellant filed her appeal with the Fourth Circuit Court of Appeals on all three counts.

Factual Averments Pertinent to Supplemental Briefing

This is the case of Postal employee JoAnn Britt, with a disability and a limited duty worker's compensation assignment, who was terminated from her job because of discrimination against her for her disability status under her limited duty assignment from the United States Department of Labor. She was further replaced by a younger, non-disabled person who also had in fact terminated her. Ms. Britt was subjected to a hostile work environment and retaliated against for two reasons: 1) her disability status with a worker's compensation claim providing her with limited duty flexibility in her job regarding hours and work time, and assignments,

and 2) for filing an EEOC complaint against her unlawful placement on leave upon false allegations. Her retaliation claim includes both of these wrong acts, not only the EEOC complaint as wrongly concluded by the court below.

Summary of Argument

Judge Bennett has provided this Court with the rare opportunity to correct a long-held misreading of Rule 4. "Without prejudice" dismissals have sadly become prejudicial to some Fourth Circuit litigants. The very concern that the Fourth Circuit may have been seeking to avoid with its current, subjective rule on appeals, that of preventing a litigant from controlling the grounds for appeal when it may simply amend and refile, have nonetheless become the exact procedure to avoid litigation traps, thereby requiring multiple cases and resulting in confusion.

The current rule places litigants in jeopardy of the procedural necessity of filing the timely appeal from a docketed final judgment involving both "with" and "without" prejudice dismissals. This bifurcates substantive claims and issues in such a manner as to deny substantive justice either if the plaintiff files her appeal or if she does not. For too many, the current rule results in potential labyrinths to reach justice, complete with the proverbial Orcs of res judicata, issue and claim preclusion, as well as timeliness and then statutes of limitation, and maybe a notice or knew or should have known question arising, all impeding the journey to Mordor, and instead disappoints the American constitutional order for souls pleading for relief.

The Fourth Circuit rule of procedure potentially limiting appeals whenever someone can refile a case and drop some claims practically cuts against the very rationale of the policy of Congress to avoid "piecemeal" litigation and appeals, as duly explained by Justice Frankfurter in *Cobbledick* v. *United States*, 309 U.S. 323, 325, 60 S. Ct. 540, 541, 84 L. Ed. 460 (1940), outlined further below in argument.

The instant case, with all three counts dismissed with prejudice while leaving a sole narrow issue of retaliation dismissed without prejudice, leaves Ms. Britt without option to litigate her substantive claims that inform the retaliation claim. So, regardless whether the Fourth Circuit adopts a new rule, we continue to argue that Appellant is entitled to her appeal because the dismissal below was prejudicial.

Argument

I. The Order of Dismissal Was a Final Order and the Court of Appeals Has Jurisdiction.

A final order allows an appeal of right under Federal Rule 4, and in practice should be seen as separate from the question of whether a litigant may choose to drop some claims dismissed with prejudice and refile the case merely with those dismissed without prejudice or appeal the entire matter.

The Supreme Court has held that dismissal without prejudice does not prevent an appeal.

> "That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned. *Wecker*

> *v. National Enameling & Stamping Co.*, 204 U.S. 176, 181—182, 27 S.Ct. 184, 186, 51 L.Ed. 430, 9 Ann.Cas. 757. See also *United States v. National City Lines*, 334 U.S. 573, 577, 68 S.Ct. 1169 1171, 92 L.Ed. 1584, and *Bowles v. Beatrice Creamery Co*., 10 Cir., 146 F.2d 774."

United States v. Wallace Tiernan Co., 336 U.S. 793, 69 S. Ct. 824, 93 L. Ed. 1042 (1949).

The Fourth Circuit's rule not only takes a different approach, it expressly militates against the actual Supreme Court rule and Fed. Rule 4 by claiming its view saves judicial economy more than the prevailing rule.

> "When such action would permit the. Plaintiff to continue the litigation in the district court, we believe the plaintiff should not be allowed to appeal the dismissal without prejudice. Such a rule better serves judicial economy than one providing an appeal of right. Thus we hold that a plaintiff may not appeal the dismissal of his complaint without prejudice unless the grounds for dismissal clearly indicate that "no amendment [in the complaint] could cure the defects in the plaintiff's case."

Domino Sugar Corp. v. Sugar Workers Local Union 392 of United Food and Commercial Workers Intern. Union, 10 F.3d 1064, 1067 (4th Cir. 1993).

The aforesaid rule falls short of good use for three reasons. First, it admits to violation of the "appeal of right" standard of the Supreme Court and Rule 4. Second, it reverses the logic for judicial economy and in practice ends up burdening the court and litigants with unintended consequences for litigation to actually increase in multiple cases and appeals. Third, it makes no distinction between dismissal of the

complaint and claims and issues in the complaint, as seen evidently in the instant case where Ms. Britt is faced with this concern.

Further, I know the Court is mindful that it is the litigant's claims at stake – nearly always shaking the heart and soul of their lives, their careers and their families as in the instant case of a 15-year employee with the entire loss of her expectation of benefits and retirement. Because pleading rules generally require all claims and issues to be raised in the complaint, for the court to force any form of bifurcation or trifurcation of the complaint with its claims and issues, and face decisions of waiver of issues that should be litigated together, while some claims dismissed are then reopened in a new separate proceeding, does a manifest a disservice to the interests of justice for those coming before the court.

Although not present in the instant matter, the dismissing of certain counts while not dismissing other counts still provides a path forward for the litigant in its case because it preserves for appeal in the same action all related, dismissed counts. Such a decision does not dismiss the entire action at bar, nor does it close the case. See *In re Ferro Corp. Derivative Litigation*, 511 F.3d 611, 617 (6th Cir. 2008)(Here, because the district court dismissed Plaintiffs' action and not just the complaint, we have jurisdiction to consider this appeal.) But that path is not so clear in matters where the entire action at bar is dismissed and the case closed, while also a fraction of one count is dismissed without prejudice. This is because it sets a likely

unattainable requirement for multiple cases to then be filed and litigated at the same time by any litigant, further ensuring heightened expense, complexity and potential confusion. If, on appeal, the litigant is successful while also preparing for trial in the other, related case, a motion or order to re-merge the cases could create further confusion and litigation delay, prejudicing the parties all the while.

The district court below dismissed with prejudice all claims except a portion of the retaliation claim, and under that claim it ignored her retaliation claim for the protected activity of the Limited Duty assignment, while dismissing without prejudice the retaliation claim for filing the EEOC complaint. JA 123.

Here, a majority of the case is dismissed with prejudice. *Id.* It would fail both judicial economy and prejudice Ms. Britt to force the majority of her case on the merits to not be appealable while only a fraction of one claim is permitted to be amended and potentially litigated.

II. The Court Should Adopt the Sixth Circuit Rule of Procedure.

One of the primary reasons in the Circuit split on this issue, is that cases, not merely one count, should be amended prior to appeal when dismissed without prejudice. *Domino Sugar v. Sugar Workers Local*, 10 F.3d 1064, 1067 (4th Cir. 1993) ("Such a rule better serves judicial economy"). But other federal circuits, including the Eleventh and Second, make all dismissals appealable as a matter of right in any case. *Id.* at 1066. The Sixth Circuit also allows appeals as of right of

any action dismissed at bar. 511 F.3d at 617. See also, *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973), and *Dearth v. Mukasey*, 516 F.3d 413, 415 (6th Cir. 2008).

The Sixth Circuit's rule follows the reasoning of the Federal Rule to prevent unfairness and misuse by means of a voluntary dismissal in order to take an appeal, including any misuse of forum shopping and transfers of jurisdiction, to which the parties may object. *Id.* at 416. Thus, the concern this Court has to avoid misuse of the rule by overzealous parties is largely protected.

The Second Circuit has persuasively elaborated that 28 U.S.C. § 1291 grants the courts of appeals jurisdiction from all final decisions of the district courts of the United States. *Elfenbein v. Gulf & Western Industries*, *Inc*., 590 F.2d 445 (2d Cir. 1978); 28 U.S.C. Sec. 1291 Final decisions of district courts (United States Code (2021 Edition)). As mentioned *supra*, Justice Frankfurter explains in *Cobbledick*:

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

Id. at 447-48.

Here, under the Fourth Circuit rule, the same enfeebling leaden-footed approach would not only "arrest" the momentum of judicial administration by

piecemeal appeals, it would disunify the components of all the claims by the mandated separate appeals and prevent a unified cause from proceeding as the litigant and the cause of justice anticipated. *Id.*

The *Elfenbein* court also cited the long-standing treatise position from Moore's Federal Practice as supportive of the fact that the order was a final order:

> "If . . . the motion (to dismiss) is sustained and the effect is to dismiss the action for want of jurisdiction, either of the person or subject matter, or because of improper venue, or for any other reason, **although the dismissal is without prejudice, the judgment is final**."

9 Moore's Federal Practice P 110.08(1) at 113 (emphasis added).

For Ms. Britt to be required to file a motion to vacate the judgment and move to amend her appeal in the district court first, prior to appealing the rest of the case, or file an entirely new action at bar, would not provide her with the necessary protections of the appeal of right. Her case would be at best bifurcated and expensive, and at worse, prevent her issues of fact to be litigated, including the near daily harassment and discrimination, and ultimate firing, after she obtained her Limited Duty assignment because of her workplace injuries.

If the Court's current rule prevents an appeal as to the dismissals of any claims with prejudice, on the premise that the dismissal of any claim(s) or issues without prejudice may separately be re-filed, it prejudices and disunifies causes of action. *Cobbledick* at 325 (Justice Frankfurter).

Doing so would require dropping out the other claims and thus losing them, on grounds of issue and/or claim preclusion, and subsequently, from any refiling or litigation once the statutes of limitation are exceeded. Such a result would be most prejudicial of a dismissal without prejudice.

Federal Rule 54(b) multiple judgment rule prohibition on appeals of any judgment that "adjudicates fewer than all the claims…" does not prevent your Appellant's appeal because Judge Bennett adjudicated all the claims and provided final judgment on all of them. Even in his dismissal without prejudice of the partial third count, retaliation, it is noted that Judge Bennett expressly held an issue preclusion of any protected activity other than "the EEOC" filing. This resulted in substantive error not only the other issue of Appellant's retaliation claim, that is the filing and receipt of the Workman's Compensation "Limited Duty Status" disability protection, binding the Postal Service to its terms in exchange for Appellant's work which is a cited reason for the discrimination she experienced in the first place, but also created an issue preclusion for the protected disability status. JA 121. By dismissing with prejudice the discrimination claims, and then precluding the issue of the disability protected status, the lower court narrowed the grounds for refiling an appeal to approximately one-quarter of the third count, which was otherwise dismissed with prejudice. JA 123-24.

Then, the final judgment goes on to pretend Appellant never made any nexus of time factual averments despite the fact that she had done so, concluding that such "failures" were "fatal to her retaliation claim". It almost appears as if the judge had first prepared the case for complete dismissal *with prejudice*, only to have someone edit it at the last to allow a *without prejudice* finding on a fractional part of Count III, so demonstrably narrow is the trifurcated without prejudice dismissal. JA 122-24.

All this points to confusion invented by a rule that has underserved its time.

Instead, the Court should adopt a plain rule that allows appeals of right pursuant to the plain reading of Rule 4(a)(1): after an entry of judgment. Rule 4 does not limit appeals to entries of judgments *with prejudice* and neither should this Court. If a case is dismissed in its entirety and the case is closed, as in the instant case, an appeal should be permitted as of right.

The Court is respectfully requested to reverse and remand the matter with an order conforming to the Amended Complaint's Request for Relief, or for an order to reopen the case below and allow discovery to be permitted to commence and the case to proceed on all counts and issues.

Conclusion

For the foregoing reasons, Appellant requests this honorable Court to vacate the lower court's Order of Dismissal and order Appellant reinstated with all back pay and benefits and relief as requested in her Amended Complaint, or alternatively, to reverse and remand all claims and issues in this case for the opportunity to proceed to discovery and a trial.

Request for Oral Argument by Remote Appearance

Appellant hereby requests this honorable Court to set in this matter for oral argument for the undersigned counsel by remote appearance because of the nature of his work in the Maryland General Assembly on the argument date of January 28, 2022.

RESPECTFULLY SUBMITTED,

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Dated: December 17, 2021

/s/ Daniel L. Cox
Counsel for Appellant

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I hereby certify that on this 17th day of December, 2021, I caused this Supplemental Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Daniel L. Cox
Counsel for Appellant