National Employment Lawyers Association

23-CV-CC

December 20, 2023

Hon. Cathy Bissoon
Joseph F. Weis, Jr. Courthouse
700 Grant Street
Pittsburgh, PA 15219

Re: *Fed. R. Civ. P.* 41

Dear Judge Bissoon,

Thank you for reaching out to the National Employment Lawyers Association (NELA) concerning its views on Rule 41. The members of NELA are familiar with the rule and welcome this opportunity to present our viewpoint and comments concerning potential amendments to the Rule.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA and its 69 circuit, state, and local affiliates have a membership of more than 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has appeared as *amicus curiae* before the United States Supreme Court and various federal Courts of Appeal regarding the proper interpretation of federal civil rights and worker protection laws. NELA also comments regularly on relevant proposed rules.

Our members represent employees in every federal jurisdiction in the United States and its territories. They experience every iteration of the voluntary dismissal conundrum: how best to dismiss without prejudice[1] one or more defendants or one or more claims. These questions frequently arise late in the litigation, either at or around summary judgment or before trial. While Rule 15, allowing a plaintiff to amend her complaint to remove a claim or party, is frequently proffered as the solution to this problem, that rule has its own complications, as noted in the subcommittee's report to the October 16, 2023 meeting of the Advisory Committee.

The Subcommittee's report fully describes the varying interpretations that the courts have given to Rule 41. NELA believes the jurisprudence interpreting the rules of procedure should be true to the text of those rules. But beyond that, NELA believes that Rule 41—like all rules—should achieve the

[1] We understand that one issue being considered by the Subcommittee concerns voluntary dismissal without prejudice. Nevertheless, dismissal with prejudice of some claims or parties raises the same textual issues under Rule 41(a), although the "finality trap" problems, discussed below, may be obviated by such a dismissal.

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speedy and inexpensive determination of every action, while minimizing the problems that can be created by the current version of the rule.[2]

NELA believes that Rule 41(a) should be amended to permit as much flexibility to dismiss claims or parties as is practicable. Unreasonable limits on the ability to streamline and simplify a case are not consistent with the goal of the rules to secure the just, speedy, and inexpensive determination of every action and proceeding. *Fed. R. Civ. P.* 1. Our reasons for supporting amendment are based, in part, upon the nature of the claims which we litigate.

Generally, when our clients approach us for representation, they are at a disadvantage. While the employee can explain what happened to her, the employer usually has the most complete pool of evidence relevant to the employee's potential claims. Further, our clients do not always approach us before filing charges with the EEOC or similar administrative agencies.[3] They often do not approach an attorney until after the administrative charges have been dismissed and they are facing a short statute of limitations.[4] Given that proceedings before the administrative agencies seldom result in the disclosure of all relevant evidence, counsel for employment plaintiffs are often compelled by their ethical duties to represent their clients competently and diligently to include all potentially viable claims in their complaints. That is particularly so when the underlying facts implicate multiple federal and state laws. Frequently, it is not until the close of discovery that plaintiff's counsel will have sufficient relevant information to determine that a claim, originally asserted in good faith, may no longer be viable, or that a party should no longer be included in the case. An amended Rule 41(a) along the lines of our proposal would streamline the process so that the parties can focus on the viable claims and relevant parties, without the costs, expenses, and confusion that preparing and submitting amended pleadings can cause. *See, Interfaces Inc. v. Hirobi,* No. 22-CV-2259, 2023 WL 4137886, at *2 (N.D. Ill. June 7, 2023).

NELA suggests that Rule 41(a) be revised as shown below (a "clean" version is followed by a "red-lined" one):

Rule 41. Dismissal of Actions, Claims, or Parties.

(a) Voluntary Dismissal.

(1) By the Plaintiff.

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[2] One problem that our research revealed was the so-called "finality" trap, more fully described below. Our proposed amendments to Rule 41 include an attempt to resolve that trap.

[3] Many employment law claims require the exhaustion of administrative remedies as a precondition to suit.

[4] Title VII and related statutes require an aggrieved individual to file suit within ninety days of the receipt of a notice of right to sue, issued when the administrative procedures have been exhausted.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action, one or more parties, or one or more claims without a court order by filing:

(i) a notice of dismissal within twenty-one days after the opposing party serves a motion under Rule 12(b), (e), or (f); an answer; a motion for summary judgment; or a motion for sanctions under Rule 11; or

(ii) a stipulation of dismissal signed by all parties who have appeared and have not been dismissed.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. A dismissal without prejudice under this Rule does not prevent an otherwise final order or judgment from being final for purposes of enforcing a judgment or appeal. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action, one or more parties, or one or more claims may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. Those terms may include that a dismissal without prejudice does not prevent an otherwise final order or judgment for being final for purposes of enforcing a judgment or appeal. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

The red-lined version:

Rule 41. Dismissal of Actions, <u>Claims, or Parties</u>.

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action, <u>one or more parties, or one or more claims</u> without a court order by filing:

(i) a notice of dismissal ~~before~~ within twenty-one days after the opposing party serves ~~either~~ a motion under Rule 12(b), (e), or (f); an answer; ~~or~~ a motion for summary judgment; or a motion for sanctions under Raule 11; or

(ii) a stipulation of dismissal signed by all parties who have appeared and have not been dismissed.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. A dismissal without prejudice under this Rule does not prevent an otherwise final order or judgment from being final for purposes of enforcing a judgment or appealing. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action, one or more parties, or one or more claims may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. Those terms may include that a dismissal without prejudice does not prevent an otherwise final order or judgment for being final for purposes of enforcing a judgment or appeal. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

The proposed change to R. 41(a)(1)(A) reflects NELA's belief that the courts and the litigants would be better served if the Rules encouraged plaintiffs to concentrate on their most viable claims.

The proposed changes to Rule 41(a)(i) would import the 21-day period for amending a complaint as of right, under Rule 15(a), and the similar time-period under Rule 11, giving plaintiffs or counterclaimants a chance for a second look that could avoid or at least mitigate the necessity for motion practice. (We also note that the filing of a motion under the time standard described in the paragraph would tend to concentrate the pleader's mind in the manner that Samuel Johnson described). While the pleader would have somewhat more time to dismiss without the court's approval than is now the case, NELA believes, for the reasons stated above, that the change would benefit the entire civil justice system.

The suggested change to Rule 41(a)(1)(ii) would make clear that parties who are no longer part of a case have no further role in it. While some courts have held that such parties must assent to a stipulation dismissing a matter (or, if the change stated above is adopted, a claim), *see* Harvey *Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 108 (2nd Cir. 1953), we know of no good reason why that should be so. There can be no benefit to the remaining parties, to the court or the civil

justice system from such a requirement and requiring all original parties to assent can obstruct those remaining in the case from achieving a result they all desire, *e.g.* when an individual defendant has disappeared, or a small corporation has gone out of business. There is no good reason to require the parties still in the case to undertake a search for that defendant, or for them to be required to involve the court, as would be required if a motion to accept the stipulated outcome is required.

Additional language is proposed for Rule 41(a)(1)(B) in order to eliminate the "finality trap," in which a foregone claim nonetheless prevents a dismissal of the remaining claims with prejudice from being final and appealable without additional court proceedings under Rules 15, 21 or 54, which can be a substantial burden. *See Williams v. Taylor Seidenbach, Inc.* 958 F.3d 341 (Fifth Cir. 2020). The injustice of the finality trap may be illustrated by this example: Suppose two employees have claims for discrimination and retaliation arising out of the same incident. Employee A files a complaint with both claims, but decides quickly that the discrimination claim will be hard or even impossible to prove, so she dismisses it without prejudice under Rule 41. Employee B's counsel, seeking simplicity or perhaps just trying to reduce the amount of work required, eschews the discrimination claim and files only for retaliation. If both cases are dismissed on summary judgment, employee B may appeal immediately, but employee A will have to jump through hoops to take the same step. Again, the interests of judicial economy and clarity counsel in favor of a rule that permits appeals from both cases to go forward at the same time.

The proposed changes to Rule 41(a)(2) would make explicit that Rule 41 may be used to dismiss claims, and not just an entire action, and incorporates the suggested language from Rule 41(a)(1)(B) to make clear that the court may avoid the finality trap.

NELA believes that the proposal outlined above would bring Rule 41 more in line with the reality of current practice and pleading and would have significant advantages over the current Rules and protocols in terms of clarity, fairness, efficiency and judicial economy.

Thank you for your attention. If you have any additional questions, please do not hesitate to contact us at jmittman@nelahq.org.

Sincerely,

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