

1992

Jim Pratt Hansen, et al. v. George Sutton, et al. : Unknown

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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FILED
Utah Court of Appeals

MAY 26 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JIM PRATT HANSEN, et al.,)	
)	
Plaintiffs/Appellants,)	CITATION OF
)	SUPPLEMENTAL AUTHORITIES
v.)	
)	
GEORGE SUTTON, et al.,)	Appeal No. 920686-CA
)	
Defendants/Respondents.)	

Pursuant to Rule 24(j), U.R.App.P., Defendants/
Appellants George Sutton, individually, and in his capacity as
Commissioner of Financial Institutions of the State of Utah, and
in his capacity as Trustee of the retained assets of Murray First
Thrift and Loan Company, Elaine B. Weis, individually and in her
capacity as former Commissioner of Financial Institutions of the
State of Utah, and the Utah Department of Financial Institutions,
respectfully submit this citation of supplemental authorities in
support of Defendants/Appellants' Brief.

The authorities were located by the undersigned counsel
while preparing for the oral argument in this matter set for May
26, 1993. In particular, the authorities cited (especially Glenn
v. First Nat. Bank in Grand Junction, 868 F. 2d 368 (10th Cir.
1989)) support Defendants/Appellants' argument a Court is not
required to grant a motion for leave to amend a complaint when
the plaintiff would otherwise have an absolute right to amend

under Rule 15(a), U.R.C.P., had leave to amend not been requested. This argument is set forth on pages 50-55 of Defendants/Appellants' Brief

The authorities and citations are as follows:

Correa-Martinez v. Arrillaga-Belendez, 903 F. 2d 49, 59 (1st Cir. 1990).

Foman v. Davis, 371 U.S. 178, 182 (1962).

Glenn v. First Nat. Bank in Grand Junction, 868 F. 2d 368 (10th Cir. 1989).

Mende v. Dun & Bradstreet, Inc., 670 F. 2d 129, 131 (9th Cir. 1982)

Mertens v. Hummell, 587 F. 2d 862, (7th Cir. 1978).


Perkins v. Silverstein, 939 F. 2d 463, 471-72 (7th Cir. 1991)

Shall v. Henry, 211 F. 2d 226, 230-31 ((7th Cir. 1954).

Copies of these citations are attached hereto for the Court's and other counsels' convenience.

DATED this 26th day of May, 1993.

JAN GRAHAM (#1231)
Attorney General

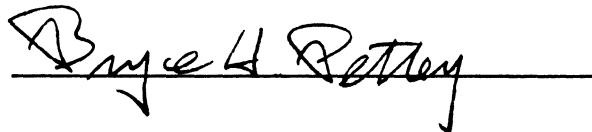

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Murray First Thrift and Loan
Company; and Elaine B. Weis,
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Commissioner of Financial
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 1993,
I did cause to be delivered by hand a true and exact copy of the
foregoing "Citation of Supplemental Authorities" to each of the
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A handwritten signature in cursive script, reading "Bryce H. Retten", is written over a horizontal line.

feitures under § 881(a)(6). *See, e.g., United States v. \$250,000*, 808 F.2d at 897. Moreover, courts in this circuit and elsewhere have repeatedly applied the burden-shifting procedures and rules of 19 U.S.C. § 1615 to the forfeiture of real property. *See, e.g., United States v. Parcel of Land and Residence Located Thereon at 5 Bell Rock Rd.*, 896 F.2d 605, 606 (1st Cir.1990); *United States v. South 23.19 Acres of Land*, 694 F.Supp. 1252, 1253-54 (E.D.La. 1988); *United States v. Premises Known as 2639 Meetinghouse Rd.*, 633 F.Supp. 979, 986-87 (E.D.Pa.1986); *see also United States v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Rd.*, 884 F.2d 41, 42-43 (1st Cir.1989) (upholding the forfeiture of real property pursuant to 21 U.S.C. § 881(a)(7)). Laliberte's argument of unconstitutional vagueness is without merit.

Even more meritless is Laliberte's argument that the allocation of burdens under 19 U.S.C. § 1615 is unconstitutional with respect to § 881 forfeitures. That argument has already been explicitly addressed and rejected by this circuit. *United States v. \$250,000*, 808 F.2d at 900.

The judgment of the district court is *Affirmed*.



Jorge CORREA-MARTINEZ,
Plaintiff, Appellant,

v.

Rene ARRILLAGA-BELENDZ, et al.,
Defendants, Appellees.

No. 89-2011.

United States Court of Appeals,
First Circuit.

Heard March 7, 1990.

Decided April 30, 1990.

Former administrative employee
named to a trust position in Puerto Rico's

judicial system brought action against three jurists, alleging that he had been forced to resign in violation of his due process and First Amendment rights. The United States District Court for the District of Puerto Rico, Juan M. Perez-Gimenez, Chief Judge, dismissed. Employee appealed. The Court of Appeals, Selya, Circuit Judge, held that: (1) employee did not have due process property interest in continued employment; (2) allegation that employee was terminated "from his employment because of his close association with [former administrative judge] * * * with whom defendants have personal and political differences" stated no cause of action for First Amendment violation under § 1983; and (3) District Court did not abuse its discretion in failing to grant employee's request for leave to amend complaint.

Affirmed.

1. Federal Civil Procedure ¶1829

Despite highly deferential reading which Court of Appeals accords litigant's complaint under rule governing motions to dismiss for failure to state claim, Court need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Civil Rights ¶234

Civil rights plaintiff may not prevail on motion to dismiss for failure to state claim simply by asserting inequity and tacking on self-serving conclusion that defendant was motivated by discriminatory animus; alleged facts must specifically identify particular instances of discriminatory treatment and, as logical exercise, adequately support thesis that discrimination was unlawful. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. Constitutional Law ¶277(2)

Engagement letter from personnel director to administrative employee named to trust position in Puerto Rico's judicial system could not effectively confer constitu-

tionally protected property interest on employee contrary to statutory/regulatory framework for government employment. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14; 3 L.P.R.A. §§ 1349-1351.

4. Master and Servant ⇐2

Where employment scheme, whether statutory, contractual, or mixed, is silent on specific points, pocked with fissures, or infected by serious strain of ambiguity, employer's conduct or declarations may appropriately be used to fill gaps so as to create constitutionally protected property interest in continued employment. U.S. C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

5. Constitutional Law ⇐277(2)

Territories ⇐23

Principles of fundamental fairness did not afford administrative employee named to trust position in Puerto Rico's judicial system a constitutionally cognizable property interest in continued employment, even though employee served judicial branch well for seven years, toiling under four administrative judges, none of whom ever questioned his trustworthiness or competence; employee's subjective expectancies could not override unambiguous commands of civil service laws under which employee could be dismissed in discretion of nominating authority. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14; 3 L.P.R.A. §§ 1349-1351.

6. Constitutional Law ⇐277(2)

Length of employment and good behavior, in and of themselves, customarily do not create constitutionally protected property interest in continued employment. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

7. Constitutional Law ⇐277(2)

Absent legal source other than superior officer's unilateral and/or unauthorized actions contrary to Puerto Rico law, government worker's pretensions to constitutionally cognizable property right in his employment must be turned aside. U.S. C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. Master and Servant ⇐30(1)

Fact that superiors have not exercised discretion to dismiss at-will employee does not normally preclude them from changing their mind, nor does it preclude new superior officer from exercising prerogative.

9. Constitutional Law ⇐277(2)

Absent adequate allegation of discrimination based on political affiliation of former administrative employee named to trust position in Puerto Rico's judicial system, regulation allegedly providing that employees "shall receive just and equitable treatment, without discrimination of any type based on * * * political affiliation" did not apply to create constitutionally cognizable property interest in continued employment. U.S.C.A. Const.Amend. 14; 42 U.S. C.A. § 1983.

10. Federal Courts ⇐915

Substantive due process claim of terminated public employee which was not pressed on appeal was waived. U.S.C.A. Const.Amend. 14.

11. Constitutional Law ⇐82(11)

Lack of property interest in continued employment cannot defeat otherwise actionable claim that termination of employee violated employee's First Amendment rights. U.S.C.A. Const.Amend. 1, 14; 42 U.S.C.A. § 1983.

12. Civil Rights ⇐235(3)

Allegation that administrative employee named to trust position in Puerto Rico's judicial system was terminated "from his employment because of his close association with [former administrative judge] * * * with whom defendants have personal and political differences" stated no cause of action for First Amendment violation under § 1983; employee did not claim that defendants discriminated against him on basis of his political beliefs or advocacy of ideas. U.S.C.A. Const.Amend. 1; 42 U.S. C.A. § 1983.

13. Constitutional Law ⇐91

First Amendment does not protect against deprivations arising out of act of association unless act itself, such as joining church or political party, speaking out on

matters of public interest, or advocacy of reform, falls within scope of constitutionally protected activities. U.S.C.A. Const. Amend. 1.

14. Civil Rights §235(3)

Merely juxtaposing protected characteristic, such as someone else's politics, with fact that public employee was treated unfairly is not enough to state First Amendment claim; what is needed is a fact-specific showing that causal connection exists linking defendants' conduct, as manifested in adverse employment decision, to employee's politics. U.S.C.A. Const. Amend. 1; 42 U.S.C.A. § 1983.

15. International Law §10.23

Absent cognizable federal question, federal court cannot intrude upon another sovereign's civil service system and declare itself court of last resort to hear personnel appeals addressed to wisdom, or even good faith, of staffing decisions reached by government actors.

16. Federal Courts §794

While Court of Appeals, in reviewing motion to dismiss for failure to state claim, must draw all reasonable inferences in plaintiff's favor, it is not obligated to credit every conceivable inference. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

17. Federal Civil Procedure §828, 851

Though district court's denial of chance to amend complaint may constitute abuse of discretion if no sufficient justification appears, district court need not grant every request to amend; where amendment would be futile or would serve no legitimate purpose, district court should not needlessly prolong matters. Fed. Rules Civ. Proc. Rule 15(a), 28 U.S.C.A.

18. Federal Civil Procedure §851

District court did not abuse its discretion in failing to grant terminated government employee's request for leave to amend civil rights complaint absent indica-

tion that employee had unearthed viable basis for his stated claim or that there was some hope for another, legally sufficient, claim. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

Charles S. Hey Maestre, Rio Piedras, P.R., for plaintiff, appellant.

Zuleika Llovet, Hato Rey, P.R., with whom Hector Rivera-Cruz, Bayamon, P.R., Secretary of Justice, Jorge I. Perez-Diaz, Sol. Gen., John F. Nevares, and Saldana, Rey, Moran & Alvarado, Hato Rey, P.R., were on brief, for defendants, appellees.

Before BREYER, TORRUELLA and SELYA, Circuit Judges.

SELYA, Circuit Judge.

Invoking 42 U.S.C. § 1983 (1982), plaintiff-appellant Jorge Correa-Martinez (Correa) sued three jurists in federal district court. Asking that the judges be judged, Correa-Martinez alleged that he had been forced to resign from the judicial branch of Puerto Rico's government in violation of his due process and first amendment rights. The district court dismissed the action for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). We affirm.

I. BACKGROUND

In reviewing a Rule 12(b)(6) dismissal, we take the well-pleaded facts as they appear in the complaint, indulging every reasonable inference in plaintiff's favor. See *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989); *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988).

The administrative arm of the Puerto Rico judicial system is formally known as the Office of Court Administration of the General Court of Justice (OCA).¹ There are two personnel classifications within the

Justice of Puerto Rico. The two superior court judges were sued in their official and personal capacities whereas Chief Justice Pons was sued only as the authority "ultimately responsible for administration" of the court system.

1. The defendants, appellees before us, are Hon. Rene Arrillaga-Belendez, a superior court judge and OCA's administrative director; Hon. Luis A. Juan-Alvarez, a superior court judge and quondam administrator of the Guayama Judicial Region; and Hon. Victor M. Pons Nunez, the Chief

judicial branch, Uniform Service and Central Service. "Officers and employees of the Uniform Service may be suspended or dismissed only for just cause prior to the formulation of charges, and they shall have the right to defend themselves and be heard in the manner provided by law." P.R.Laws Ann. tit. 4, Appx. XIII, Reg. 16 (1978) (district court's translation). In contrast, "[o]fficers and employees of the Central Service, except judges, may be suspended or dismissed by the Nominating Authority in its discretion." *Id.*

Correa toiled in OCA's vineyards from 1981 through 1988. When originally hired, he received an engagement letter telling him that he was being named to a "trust" position in the Central Service.² The letter also warned that continued employment was dependent upon his "efficiency, attitude, availability and compliance with the regulations in effect." Although he started at a lower rank, Correa served for several years as Executive Director I, Guayama Judicial Region. He describes his functions as "essentially administrative in character." His performance evaluations were uniformly favorable and led to a number of merit-related pay increases.

Near the end of 1988, the halcyon days drew to a close. Judge Juan-Alvarez became the interim administrator of the Guayama Judicial Region and asked plaintiff to resign. Plaintiff complied. His resignation was officially accepted by Judge Arrilaga-Belendez. The complaint alleges that defendants did not afford Correa a hearing and gave no reason for forcing him to quit.

Plaintiff now attacks on two fronts. Contending that he possessed a "clear and substantial property interest" in continued employment at OCA, he maintains that his constructive discharge, unaccompanied by any hearing or explanation, violated procedural due process. Asserting simultaneously that the defendants cashiered him because of his close association with a for-

mer administrative judge, he maintains that his ouster ran afoul of the first amendment.

The district court found both offensives lacking in firepower and dismissed the complaint. The court ruled that Correa, as a trust employee in the Central Service, had no property interest in his position and could thus be fired in the employer's discretion without notice or hearing. The court also rejected the first amendment claim, stating that "[m]ere personal and political differences between the defendants and a third party . . . cannot support the allegations of political discrimination against plaintiff." This appeal ensued.

II. PRINCIPLES AFFECTING APPELLATE REVIEW

In the Rule 12(b)(6) milieu, an appellate court operates under the same constraints that bind the district court, that is, we may affirm a dismissal for failure to state a claim only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory. *Conley v. Gibson*, 355 U.S. 41, 45-48, 78 S.Ct. 99, 101-03, 2 L.Ed.2d 80 (1957); *Dartmouth Review*, 889 F.2d at 16. In making that critical determination, we accept plaintiff's well-pleaded factual averments and indulge every reasonable inference hospitable to his case. *Gooley*, 851 F.2d at 514.

[1] In the menagerie of the Civil Rules, the tiger patrolling the courthouse gates is rather tame, but "not entirely . . . toothless." *Dartmouth Review*, 889 F.2d at 16. Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation. See *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 765 (1987). Moreover, the rule

2. In Puerto Rico, "trust" positions ("de confianza") are noncareer positions which do not have the civil service protection accorded "career" positions ("de permanencia"). See P.R.Laws Ann. tit. 3, §§ 1349-51 (1978) (executive branch). "In contrast to a 'career' employee, an

employee of 'trust' may, under Puerto Rico law, be discharged at will and without cause." *Rodriguez Rodriguez v. Munoz Munoz*, 808 F.2d 138, 140 (1st Cir.1986), *accord Ruiz-Roche v. Lausell*, 848 F.2d 5, 7 (1st Cir.1988).

Cite as 903 F.2d 49 (1st Cir. 1990)

does not entitle a plaintiff to rest on "subjective characterizations" or conclusory descriptions of "a general scenario which could be dominated by unpleaded facts." *Dewey v. Univ. of New Hampshire*, 694 F.2d 1, 3 (1st Cir.1982), *cert. denied*, 461 U.S. 944, 103 S.Ct. 2121, 77 L.Ed.2d 1301 (1983). We understand that, for pleading purposes, the dividing line between sufficient facts and insufficient conclusions "is often blurred." *Dartmouth Review*, 889 F.2d at 16. But the line must be plotted:

It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes.

Id.

[2] There is another principle at work as well. We have frequently recognized that, in cases where civil rights violations are alleged, particular care is required to balance the liberality of the Civil Rules with the need to prevent abusive and unfair vexation of defendants. *See, e.g., id.; Dewey*, 694 F.2d at 3; *Slotnick v. Stavisky*, 560 F.2d 31, 33 (1st Cir.1977), *cert. denied*, 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978). A civil rights complaint must "outline facts sufficient to convey specific instances of unlawful discrimination." *Dartmouth Review*, 889 F.2d at 16. Put another way, a plaintiff may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by a discriminatory animus. The alleged facts must specifically identify the particular instance(s) of discriminatory treatment and, as a logical exercise, adequately support the thesis that the discrimination was unlawful. *See Dartmouth Review*, 889 F.2d at 20; *see also Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1026-27 (1st Cir. 1988); *Johnson v. General Elec. Co.*, 840 F.2d 132, 138 (1st Cir.1988); *Springer v. Seaman*, 821 F.2d 871, 880 (1st Cir.1987).

3. According to the Rules of Administration of the Personnel System of the Judicial Branch, positions in the Central Service include "[p]ositions of assistants to the executives and/or di-

Discrimination based on unprotected characteristics or garden-variety unfairness will not serve.

With these precepts squarely in mind, we proceed to evaluate Correa's allegations.

III. THE DUE PROCESS CLAIM

As a prerequisite to his due process claim, plaintiff must demonstrate the existence of a constitutionally cognizable property or liberty interest. *See Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). Correa seeks to scale this hurdle by alleging that he had a property interest in his employment. He falls far short.

[3] Constitutionally protected property interests originate in extra-constitutional sources; they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *accord Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976); *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 319 (1st Cir.1989) (en banc); *Ruiz-Roche v. Lausell*, 848 F.2d 5, 7 (1st Cir.1988). Here, plaintiff claims to derive his property interest principally from the circumstances of his hiring.

Correa acknowledges that OCA's engagement letter notified him that he had been named to a trust position in the Central Service.³ He also concedes that Central Service employees are subject to dismissal at the employer's discretion. *See P.R.Laws Ann. tit. 4, Appx. XIII, Reg. 16*. These verities notwithstanding, Correa argues that the written confirmation of his particular appointment "tempered" the ramifications normally attendant to the post. In this respect, he points out that the

recting officers . . . which because of their functions require personal trust." P.R.Laws Ann. tit. 4, Appx. XII, Rule 4(1)(c) (plaintiff's translation).

engagement letter admonished that "your permanency in the [position] will depend upon your efficiency, attitude, disposition and . . . compliance with regulations in effect" from time to time. Plaintiff suggests that OCA thereby limited its discretion, granting him job security so long as he fulfilled these few written conditions.

Appellant's thesis boils down to the idea that the engagement letter *ex proprio vigore* comprised an independent source for a legitimate expectation of continued employment, and hence, for a property interest. We give Correa high marks for ingenuity but a failing grade in persuasion. The engagement letter clearly informed plaintiff that he was being hired to a trust position. He accepted the characterization then—and must accept it now. Trust employees may be freely dismissed in the discretion of the nominating authority (here, OCA); indeed, the very essence of trust positions is their lack of permanence. See, e.g., *Ruiz-Roche*, 848 F.2d at 7. So, plaintiff's construct has force only if, and to the extent that, the personnel director could effectively limit OCA's statutory powers by adopting terms and conditions outside of, and flatly inconsistent with, the legislatively mandated criteria. This is a Houdini-in-reverse argument, which assumes that a government employer can be securely locked into a box that the legislature has purposely left wide open. We find altogether untenable the notion that civil service laws can so nimbly be sidestepped.

We have regularly held that, under Puerto Rico law, government employees hired illegally to permanent or career positions are neither invested with property interests in continued employment nor entitled to the due process protections which inure to their legally hired counterparts. See *Rosario-Torres*, 889 F.2d at 319; *de Feliciano v. de Jesus*, 873 F.2d 447, 452-55 (1st Cir.), cert. denied, — U.S. —, 110 S.Ct. 148, 107 L.Ed.2d 107 (1989); *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 436-37 (1st Cir.1989); *Kauffman v. Puerto Rico Tele-*

phone Co., 841 F.2d 1169, 1173 (1st Cir. 1988).^{*} In those cases, the plaintiffs were hired in violation of the Puerto Rico Personnel Act or some other recruitment protocol. See, e.g., *Rosario-Torres*, 889 F.2d at 319. Notwithstanding that the fault was entirely the nominating authority's, we ruled that an employer's "failure to abide by the rules when [employees] were hired . . . has nothing to do with . . . whether or not Puerto Rico law gave the plaintiffs a sufficient 'property interest' in their jobs as to invoke the protection of the Fourteenth Amendment." *de Feliciano*, 873 F.2d at 454; see also *Franco v. Municipality of Cidra*, 113 D.P.R. 334, 337 (1982) (municipality's "decisions and actions, which were contrary to and incompatible with the Personnel Act, lacked sufficient legal force to create and ratify a career position and appointment that was essentially a confidential position"); *Colon-Perez v. Mayor of Municipality of Ceiba*, 112 D.P.R. 934, 940 (1982) (same).

Unless we are prepared to abandon the rationale of this line of cases, it must follow that OCA's personnel director could not effectively confer a property interest on plaintiff merely by making statements contrary to the Commonwealth's extensive statutory/regulatory framework anent government employment. Cf. *Goyco de Maldonado v. Rivera*, 849 F.2d 683, 688 (1st Cir.1988) (government employer may not insulate employment decisions from constitutional scrutiny "by the relatively simple expedient of passing a rule or enacting a by-law"). In Puerto Rico, an incoming administration has a legislatively assured right to fill jobs implicating the employer's confidence or trust with persons of the administration's choosing. We do not believe that this right can be subjected to casual deprivation or that the legislature's will can so easily be thwarted. Indeed, were plaintiff's general argument to prevail, the carefully thought-out civil service system could easily be wrecked by mid-ech-

^{*} Judge Torruella continues to believe that this line of authority is wrongly decided, see *Rosario-Torres*, 889 F.2d at 325-26 (Torruella, J., dissenting), and in any event, is of the opinion that

present reliance on the same is unnecessary to decide the issues raised by this appeal. He therefore disassociates himself from this portion of the opinion.

Cite as 903 F.2d 49 (1st Cir. 1990)

elon managers bent on shaping the system to their own ends.

To be sure, an employer's unilateral declarations, promises, or conduct regarding conditions of continued employment might in some circumstances create a "legitimate claim of entitlement to job tenure." *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972). In *Perry*, for example, the Court held that a professor should have been given an opportunity to prove his claim that he had developed a property interest under the college's unwritten "*de facto*" tenure program. *Id.* at 603, 92 S.Ct. at 2700. The Court noted that the "absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment," especially where the employer's practices or representations supplement other, explicit contractual provisions. *Id.* at 601-02, 92 S.Ct. at 2699-2700; see also *Cheveras Pacheco v. Rivera Gonzalez*, 809 F.2d 125, 127 (1st Cir.1987) (recognizing that interstitial or supplemental representations might create constitutionally protectable property interests).

[4] The *Perry* rule depends, of course, on perforation, that is, on pockets of uncertainty. Where an employment scheme—whether statutory, contractual, or mixed—is silent on specific points, pocked with fissures, or infected by a serious strain of ambiguity, an employer's conduct or declarations may quite appropriately be used to fill the gaps. In the case at bar, however, there were no gaps to fill. The written assurances given to plaintiff, to the extent they can be interpreted to mean what plaintiff says they mean (a matter as to which we take no view), stand in direct contravention of a comprehensive network of statutory and regulatory directives governing the terms of Central Service employment and trust positions generally. It would rock the foundations of that system to rely on the arguably contradictory terms of a personnel director's welcoming missive to

supervene the letter of law. Thus, the engagement letter could not and did not create a cognizable property interest in the Executive Director I position. Cf. *Ruiz-Roche*, 848 F.2d at 8 (government employer's naked promise of future career employment insufficient to create property interest on part of trust employee).

[5, 6] There is yet another base to be touched. Both apart from, and in concert with, the engagement letter, Correa also argues his due process claim in terms of "fundamental fairness." We are not unsympathetic to his plea. Plaintiff served the judicial branch well for seven years. He toiled under four administrative judges, none of whom ever questioned his trustworthiness or competence. In short, taking the complaint at face value, he did nothing wrong. Be that as it may, length of employment and good behavior, in and of themselves, customarily do not create a property interest in continued employment. See *Perry*, 408 U.S. at 601-02, 92 S.Ct. at 2699-2700; *Bollow v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093, 1099 (9th Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982). That plaintiff claims to have performed mainly administrative duties is beside the point; what matters, in the due process context, is the legislative classification of Correa's position as one of trust in the Central Service.

[7, 8] As in the cases where employees were assigned career positions in an irregular manner and had good reason to believe that their positions were secure, plaintiff's subjective expectancies cannot override the unambiguous commands of the civil service laws. Without some legal source other than a superior officer's unilateral and/or unauthorized actions contrary to Puerto Rico law, a government worker's pretensions to a constitutionally cognizable property right in his employment must be turned aside. See *Rosario-Torres*, 889 F.2d at 316; *de Feliciano*, 873 F.2d at 453-55; *Santiago-Negron*, 865 F.2d at 436; *Kauffman*, 841 F.2d at 1173.⁴

4. Correa's case, we might add, is considerably less compelling than the cited cases in that, unlike the employees in, say, *Rosario-Torres*,

889 F.2d at 316, Correa was clearly informed from the beginning that his position was one of trust within the Central Service. Moreover, the

[9] Plaintiff tries unsuccessfully to bolster his due process claim by pointing to the Regulations of Administration of the Personnel System of the Judicial Branch, specifically P.R.Laws Ann. tit. 4, Appx. XIII, Reg. 2 (employees "shall receive just and equitable treatment, without discrimination of any type based on race, creed, color, sex, social condition or political affiliation") (plaintiff's translation). Without an adequate allegation of discrimination based on plaintiff's political affiliation, see *infra* Part IV, the regulation is simply not in play. Nor can the other, arguably ambiguous, regulatory language to which Correa alludes, e.g., P.R.Laws Ann. tit. 4, Appx. XIII, Reg. 3, be construed to contradict the fundamental merit principle embodied in Puerto Rico's extensive public employment scheme.

[10] To say more would be to paint the lily. Because the plaintiff has not alleged facts sufficient to support a reasonable expectation of, or recognizable property interest in, continued government employment, defendants were not constitutionally required to afford him any process before ending his OCA service. Insofar as the motion to dismiss addressed the due process claim, it was properly granted.⁵

IV. THE FIRST AMENDMENT CLAIM

[11] The foregoing explication does not entirely settle matters. Correa also contends that his first amendment rights were abridged. That statement of claim, if otherwise actionable, cannot be defeated by the lack of a property interest. See *Branti*

v. Finkel, 445 U.S. 507, 512 n. 6, 100 S.Ct. 1287, 1291 n. 6, 63 L.Ed.2d 574 (1980); *Santiago-Negron*, 865 F.2d at 436; *Chevereras Pacheco*, 809 F.2d at 128. As the Court has taught:

[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

Perry, 408 U.S. at 597, 92 S.Ct. at 2697.

[12] The crux of the first amendment initiative is the allegation that the defendants "were motivated by their discriminatory intent to terminate plaintiff from his employment because of his close association with [the former administrative judge] ... with whom defendants have personal and political differences." The district court held that no cause of action was stated. We agree.

At a bare minimum, plaintiff's burden at the pleading stage was to allege facts which, if proven, would demonstrate that his forced resignation was brought about by discrimination on the basis of some constitutionally safeguarded interest. See *Branti*, 445 U.S. at 515, 517, 100 S.Ct. at 1293, 1294; *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Cordero v. de Jesus-Mendez*, 867 F.2d 1, 5 (1st Cir.1989). The Supreme Court has held that the first amendment protects nonpolicymakers from being drummed out of public service on the basis of their political affiliation or advocacy of ideas.⁶ See *Branti*, 445 U.S. at 517,

fact that superiors had not exercised their discretion to dismiss an at-will employee does not normally preclude them from changing their mind, nor does it preclude a new superior officer from exercising the prerogative.

5. Although plaintiff's complaint mentions substantive due process as well as procedural due process, he does not press the former point on appeal. In view of "the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived," *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990), we omit any discussion of substantive due process.

6. We use the term "nonpolicymakers," perhaps inartfully, as a shorthand reference to those

instances where, because the affected employees are neither "involved in policymaking, the communication of political ideas, or sensitive tasks connected with the policymaking function," *Vazquez Rios v. Hernandez Colon*, 819 F.2d 319, 322 (1st Cir.1987), nor "occupy[ing] positions of ... unusually intimate propinquity to government leaders," *id.* at 324, partisan affiliation is an inappropriate job criterion. Inasmuch as Correa has not alleged facts sufficient to permit a finding that a constitutionally sacrosanct interest was transgressed, see *infra*, we need not decide whether political loyalty was a permissible requirement for the position that he held. For the same reason, we have no occasion to reach appellant's contention that this case differed from other public employment cases be-

Cite as 903 F.2d 49 (1st Cir. 1990)

100 S.Ct. at 1294 (dismissals actionable if plaintiffs "were discharged 'solely for the reason that they were not affiliated with or sponsored by [a particular] Party' ") (citation omitted); *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976) (plurality op.) (first amendment protects "freedom to associate with others for the common advancement of political beliefs and ideas"); cf. *Perry*, 408 U.S. at 597-98, 92 S.Ct. at 2697-98 (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech"). We have myriad cases in the same mold. See, e.g., *Agosto de Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1212 n. 1 (1st Cir.1989) (en banc) (setting forth partial listing); *Rosario-Torres*, 889 F.2d at 315 (similar). The case at bar is at a further remove.

Here, plaintiff does not allege that his politics, his ideology, or his advocacy of political goals led to his downfall. The complaint is altogether silent as to whether Correa had any partisan affiliation or espoused any controversial political views. It does not say if, or how, Correa's affiliations or views differed from those of the incumbent judges. Refined to bare essence, then, plaintiff does not claim that defendants discriminated against him on the basis of his political beliefs or advocacy of ideas—discrimination which would implicate an interest shielded by the Bill of Rights. Rather, he asserts only that defendants had "personal and political differences" with an unrelated individual, Judge Padilla (the jurist formerly in charge of the Guayama Judicial Region), and discriminated against him (plaintiff) because of his "close association" with Judge Padilla. We do not think that such discrimination, if it existed, impinged upon a constitutionally protected right.

cause he was an employee of the judicial branch of government. No matter how tantalizing issues may appear, courts must be reluctant to plunge headlong into uncharted decisional waters where no need exists.

7. Appellant has not claimed that, although he was in fact nonpolitical, defendants forced him to resign because they (mistakenly) thought he

[13] Various relationships have been sheltered under the capacious constitutional tent of freedom of association. See, e.g., *NAACP v. Button*, 371 U.S. 415, 429-30, 83 S.Ct. 328, 335-36, 9 L.Ed.2d 405 (1963) (first amendment protects "vigorous advocacy" and right "to engage in association for the advancement of beliefs and ideas"; *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958) (Bill of Rights safeguards "beliefs sought to be advanced by association [which] pertain to political, economic, religious or cultural matters"). Nevertheless, it is clear that, in constitutional terms, freedom of association is not to be defined unreservedly. Entry into the constitutional orbit requires more than a mere relationship. The Constitution may be interposed as a barrier to state action only to the extent that the targeted association is characterizable in terms of some particular constitutional concern. See *United States v. Comley*, 890 F.2d 539, 544 (1st Cir.1989); see also L. Tribe, *American Constitutional Law* § 12-23, at 702-03 (1978). Put another way, the first amendment does not protect against all deprivations arising out of an act of association unless the act itself—say, joining a church or a political party, speaking out on matters of public interest, advocacy of reform—falls within the scope of activities eligible for inclusion within the constitutional tent.

Analyzed in this light, Correa's complaint was vulnerable to a motion to dismiss. The complaint did not say that plaintiff possessed, or expressed, any significant political views; indeed, implicit in plaintiff's arguments is the suggestion that he, himself, scrupulously avoided partisan political involvement.⁷ The complaint contained no facts regarding the political contours, if any, of Correa's relationship with Judge

was a member of the opposition party. We express no opinion, therefore, on whether a discharge which arises not out of an employee's political activity, but out of the government employer's belief, wrongly held, that the employee was in league with the opposition party, would be actionable under the rubric of the first amendment.

Padilla. It contained no facts capable of supporting an inference that the relationship came within the constitutional orbit. It did not maintain that defendants knew anything about plaintiff's politics or that their motivation related in the slightest to plaintiff's exercise of any first amendment or other constitutionally protected right.

This deficit, we suggest, leaves a chasmal gap—one not bridged by plaintiff's bald assertion that defendants constructively discharged him due to his relationship with Judge Padilla. At most, the complaint might support an inference that politics was in the air between defendants and Judge Padilla. Nevertheless, a politically charged atmosphere of that sort, without more, provided no basis for a reasonable inference that defendants' employment decisions about plaintiff were tainted by their disregard of plaintiff's first amendment rights. *Cf. Dartmouth Review*, 889 F.2d at 16 ("smoke alone is not enough to force the defendants to a trial to prove that their actions were not . . . discriminatory") (citation omitted). Absent a constitutionally protected aspect, a "close relationship" with a third party is insufficient to invoke the prophylaxis of the *Elrod-Branti* rule, notwithstanding that consideration of the third party's political beliefs may have entered into the decisionmaking calculus.

[14] Of course, plaintiff tells us that political association is the protected characteristic, but that approach, too, rings hollow. Merely juxtaposing a protected characteristic—someone else's politics—with the fact that plaintiff was treated unfairly is not enough to state a constitutional claim. *See Dartmouth Review*, 889 F.2d at 19; *see also Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir.1990) (in age discrimination case, plaintiff must show a discriminatory animus based on his age); *White v. Vathally*, 732 F.2d 1037, 1042-43 (1st Cir.) (similar; Title VII), *cert. denied*, 469 U.S. 933, 105 S.Ct. 831, 83 L.Ed.2d 267 (1984); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir.1982) (factual allegations must show that protected quality "was the reason for dismissal"). What is needed is a fact-specific showing

that a causal connection exists linking defendants' conduct, as manifested in the adverse employment decision, to plaintiff's politics, that is, the plaintiff must have pled facts adequate to raise a plausible inference that he was subjected to discrimination based on his political affiliation or views. No such facts were marshalled here.

[15] We make one final observation. We do not suggest that if, as plaintiff would have it, defendants chose to jettison a competent, hardworking employee because of his loyalty, real or imagined, to a former superior, the court system would be well served or fairness achieved. But that is not the point. In the absence of a cognizable federal question, a federal court cannot intrude upon another sovereign's civil service system and declare itself a court of last resort to hear personnel appeals addressed to the wisdom, or even the good faith, of staffing decisions reached by the government actors. *Cf., e.g., Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1341 (1st Cir.1988) (Age Discrimination in Employment Act "does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age"); *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251, 255 (1st Cir.1986) (civil rights laws do not forestall cashiering an employee "arbitrarily or with ill will," absent prohibited discrimination).

[16] We have said enough. While Rule 12(b)(6) requires deference to the well-pleaded allegations of plaintiff's complaint, we are not obligated to give free rein to imagination. *See Gooley*, 851 F.2d at 514 ("court need not conjure up unpled allegations or contrive elaborately arcane scripts"). Although we must draw all reasonable inferences in plaintiff's favor, we are not obligated to credit every conceivable inference. *See Gray*, 792 F.2d at 256 ("unreasonable and speculative inferences" cannot be allowed to bottom a civil rights action). The evenhanded application of these principles necessitates that we affirm the ruling that plaintiff's complaint failed

to state an actionable first amendment claim.

V. THE REQUEST TO AMEND

After defendants moved to dismiss in the district court, plaintiff had an opportunity to amend his complaint as of right.⁸ Eschewing such a course, plaintiff instead opposed the motion and inserted in his opposition a request that he be allowed to file an amended complaint if the motion was granted. The district court never acted on the request. Correa now portrays this omission as an abuse of the court's discretion.

[17] Because leave to amend "shall be freely given when justice so requires," Fed. R.Civ.P. 15(a), a district court's denial of a chance to amend may constitute an abuse of discretion if no sufficient justification appears. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). On the other hand, a district court need not grant every request to amend, come what may. See *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1121 (1st Cir.1989); *Quaker State Oil Refining Corp. v. Garriety Oil Co.*, 884 F.2d 1510, 1517-18 (1st Cir.1989). Where an amendment would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters. See *Foman*, 371 U.S. at 182, 83 S.Ct. at 230. For aught that appears, this case is in that vein.

We have examined the amendments suggested in plaintiff's opposition to the motion to dismiss and in his appellate brief. We find nothing of decretory significance, that is, nothing which would repair the

holes in Correa's case. For example, plaintiff offered to submit the unexpurgated text of the engagement letter, but there is no indication that any statements other than the excerpts already contained in the complaint would be relevant. Plaintiff also offered several sworn statements substantiating what the complaint already alleged about plaintiff's excellent work record, the nature of his duties, and OCA's wonted personnel practices. These submissions would plainly have been superfluous; the well-pleaded allegations of the complaint, without buttressing, were taken as true for purposes of defendants' Rule 12(b)(6) motion. See *supra* Part II and cases cited. Moreover, as we have explained at some length, this case is not about the essential justness of defendants' decision to oust plaintiff from his governmental post; it is about the presence or absence of a claim cognizable under the federal Constitution and 42 U.S.C. § 1983.

[18] Having culled plaintiff's representations as to what he might in good faith be able to allege, we are satisfied that this is an instance where "the 'new' facts are of the same genre as the 'old' facts...." *Dartmouth Review*, 889 F.2d at 23. Without any indication that plaintiff had unearthed a viable basis for his stated claim, or that there was some hope for another (legally sufficient) claim, the court below did not abuse its discretion in failing to grant Correa's request for leave to amend.⁹

VI. CONCLUSION

To recapitulate, plaintiff has failed to demonstrate anything more than a unilater-

8. A party may amend "once as a matter of course at any time before a responsive pleading is served." Fed.R.Civ.P. 15(a). Inasmuch as defendants' dismissal motion did not constitute a responsive pleading, see *Dartmouth Review*, 889 F.2d at 22; *McDonald v. Hall*, 579 F.2d 120, 121 (1st Cir.1978), plaintiff was not required to seek leave to amend.

9. We note in passing that plaintiff offhandedly inserted the conditional request to amend in his opposition below and did not renew it after the district court ruled. He may very well have waived the point. See generally *Dartmouth Review*, 889 F.2d at 22 ("In this circuit, 'it is a party's first obligation to seek any relief that

might fairly have been thought available in the district court before seeking it on appeal.'") (quoting *Beaulieu v. United States Internal Revenue Service*, 865 F.2d 1351, 1352 (1st Cir.1989)); *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635-36 (1st Cir.1988) ("When in the ordinary case, 'the pleader has stood upon his pleading and appealed from a judgment of dismissal, amendment will not ordinarily be permitted ... if the dismissal is affirmed.'") (citation omitted); cf. *James v. Watt*, 716 F.2d 71, 77-78 (1st Cir.1983), cert. denied, 467 U.S. 1209, 104 S.Ct. 2397, 81 L.Ed.2d 354 (1984). We have elected, however, to address the question frontally.

al expectation of continued employment at OCA. While he may or may not have been treated fairly, we find nothing in the record which might demonstrate that he had a property interest in his job or that constructive discharge was offensive to the Constitution. Plaintiff's first amendment claim, which pivots not on his politics but on the persona and politics of a third party, will not wash. And because Correa's proffered amendments were designed to amplify substantively defective statements of claim rather than to repair the defects, there was no good reason to allow the filing of an amended complaint.

We need go no further. Correa's suit was appropriately dismissed. The order and judgment below must therefore be

Affirmed.



UNITED STATES of America, Appellee,

v.

Edward CARDONA,
Defendant, Appellant.

No. 88-1537.

United States Court of Appeals,
First Circuit.

Heard Jan. 10, 1990.

Decided May 10, 1990.

Defendant was convicted, in the United States District Court for the District of Rhode Island, Francis J. Boyle, Chief Judge, of being a convicted felon in possession of a firearm and he appealed. The Court of Appeals, Selya, Circuit Judge, held that defendant, as parolee, was properly arrested in his own home even though arresting officer did not possess judicial warrant.

Affirmed.

Bownes, Senior Circuit Judge, dissented and filed opinion.

Pardon and Parole ⇐80

Searches and Seizures ⇐69

Parolee was properly arrested in his own home even though arresting officer did not possess judicial warrant, inasmuch as officer acted in good faith at request of parole authorities who, in accordance with parole regulation, had found reasonable cause to order parolee's detention as suspected parole violator; thus, officer's seizure of shotgun in plain view was legal. U.S.C.A. *Corr.* Amend. 4.

Francis X. Mackey, Providence, R.I., for defendant, appellant.

Margaret E. Curran, Asst. U.S. Atty., Providence, R.I., with whom Lincoln C. Almond, U.S. Atty., was on brief, for appellee.

Before TORRUELLA and SELYA, Circuit Judges, and BOWNES, Senior Circuit Judge.

SELYA, Circuit Judge.

This case requires us, for the first time, to explore the interstices and margins of the Court's opinion in *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Having completed this journey into fourth amendment jurisprudence, we hold that a parolee may be arrested in his own home by a police officer not possessing a judicial warrant when the police officer acts in good faith at the request of parole authorities who, in accordance with a parole regulation, have found reasonable cause to order the individual's detention as a suspected parole violator.

I. BACKGROUND

Defendant-appellant Edward Cardona, previously convicted of a felony in New York, was on parole in Rhode Island pursuant to an interstate parole compact. After defendant's Rhode Island parole officer reported problems, a parole violation warrant (PVW) was issued by the New York parole

FOMAN *v.* DAVIS, EXECUTRIX.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT.

No 41 Argued November 14, 1962—Decided December 3, 1962

A Federal District Court dismissed petitioner's complaint in a civil action for failure to state a claim upon which relief might be granted. Petitioner promptly moved to vacate the judgment and amend the complaint so as to state an alternative theory for recovery. Before the Court ruled on those motions, petitioner filed notice of appeal from the judgment of dismissal. Subsequently, the District Court denied the motions to vacate the judgment and to amend the complaint, and petitioner filed notice of appeal from that denial. On appeal, the parties briefed and argued the merits of both the dismissal of the complaint and the denial of petitioner's motions. The Court of Appeals treated the first notice of appeal as premature, because of the then pending motion to vacate, and it dismissed that appeal. It held that the second notice of appeal was ineffective to review the judgment of dismissal, because it failed to specify that the appeal was from that judgment, and it affirmed denial of petitioner's motions, on the ground that there was nothing in the record to support a finding that the District Court had abused its discretion in refusing to allow amendment of the complaint. *Held*·

1 On the record in this case, the Court of Appeals erred in narrowly reading the second notice of appeal as applying only to the denial of petitioner's motions, since petitioner's intention to seek review of both the dismissal of the complaint and the denial of her motions was manifest from the record as a whole. Pp 181-182

2 The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment of dismissal in order to allow amendment of the complaint, since it appears from the record that the amendment would have done no more than state an alternative theory of recovery, Federal Rule of Civil Procedure 15 (a) declares that leave to amend "shall be freely given when justice so requires," and denial of the motion without any apparent justifying reason was an abuse of discretion. P 182

292 F. 2d 85, reversed.

Milton Bordwin argued the cause and filed briefs for petitioner.

Roland E. Shaine argued the cause for respondent. With him on the briefs was *Richard R. Caples*.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Petitioner filed a complaint in the District Court alleging that, in exchange for petitioner's promise to care for and support her mother, petitioner's father had agreed not to make a will, thereby assuring petitioner of an intestate share of the father's estate; it was further alleged that petitioner had fully performed her obligations under the oral agreement, but that contrary thereto the father had devised his property to respondent, his second wife and executrix. Petitioner sought recovery of what would have been her intestate share of the father's estate. Respondent moved to dismiss the complaint on the ground that the oral agreement was unenforceable under the applicable state statute of frauds. Accepting respondent's contention, the District Court entered judgment on December 19, 1960, dismissing petitioner's complaint for failure to state a claim upon which relief might be granted. On December 20, 1960, petitioner filed motions to vacate the judgment and to amend the complaint to assert a right of recovery in *quantum meruit* for performance of the obligations which were the consideration for the assertedly unenforceable oral contract. On January 17, 1961, petitioner filed a notice of appeal from the judgment of December 19, 1960. On January 23, 1961, the District Court denied petitioner's motions to vacate the judgment and to amend the complaint. On January 26, 1961, petitioner filed a notice of appeal from denial of the motions.

On appeal, the parties briefed and argued the merits of dismissal of the complaint and denial of petitioner's

motions by the District Court. Notwithstanding, the Court of Appeals of its own accord dismissed the appeal insofar as taken from the District Court judgment of December 19, 1960, and affirmed the orders of the District Court entered January 23, 1961. 292 F. 2d 85. This Court granted certiorari. 368 U. S. 951.

The Court of Appeals reasoned that in the absence of a specific designation of the provision of the Federal Rules of Civil Procedure under which the December 20, 1960, motion to vacate was filed, the motion would be treated as filed pursuant to Rule 59 (e), rather than under Rule 60 (b);¹ since, under Rule 73 (a),² a motion under Rule 59 suspends the running of time within which an appeal may be perfected, the first notice of appeal was treated as premature in view of the then pending motion to vacate and of no effect. The Court of Appeals held the second notice of appeal, filed January 26, 1961, ineffective to review the December 19, 1960, judgment dismissing the complaint because the notice failed to specify that the appeal was being taken from that judgment as well as

¹ Rule 59 (e) provides:

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60 (b) provides in relevant part:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . ."

² Rule 73 (a) provides in relevant part:

"The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules . . . granting or denying a motion under Rule 59 to alter or amend the judgment"

from the orders denying the motions. Considering the second notice of appeal, therefore, only as an appeal from the denial by the District Court of the motions to vacate and amend, the Court of Appeals held that there was nothing in the record to show the circumstances which were before the District Court for consideration in ruling on those motions; consequently it regarded itself as precluded from finding any abuse of discretion in the refusal of the court below to allow amendment.

The Court of Appeals' treatment of the motion to vacate as one under Rule 59 (e) was permissible, at least as an original matter, and we will accept that characterization here. Even if this made the first notice of appeal premature, we must nonetheless reverse for we believe the Court of Appeals to have been in error in so narrowly reading the second notice.

The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal.

It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by

counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Rule 15 (a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, *Federal Practice* (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Separate memorandum of MR. JUSTICE HARLAN, in which MR. JUSTICE WHITE joins.

I agree with the Court as to the dismissal of petitioner's appeal by the Court of Appeals. However, as to her motion to vacate the order of the District Court and for leave to amend the complaint, I believe such matters are best left with the Courts of Appeals, and I would dismiss the writ of certiorari, in that respect, as improvidently granted.

conclusion is the same as the one that we advance here:

[T]he court finds that federal statutes and regulations pertaining to an interstate carrier's use of nonowned equipment do not render the carrier or its insurer *exclusively* liable for personal injuries or property damage sustained in an accident involving such equipment. Instead, federal law, as interpreted by the Tenth Circuit, imposes liability on all insurers who are obligated to provide some type of coverage for damage pursuant to the terms of their policies and any endorsements thereto. Under federal law, the insurer of an ICC-licensed carrier is required to provide primary coverage for any final judgment obtained against the carrier. However, the mere fact that an interstate carrier is involved does not absolve other insurers from their obligations under other policies which are applicable to the claims.

Id. at 569.

[7, 8] We are in complete agreement with the district court in *American General*, and adopt its reasoning:

[T]here is no reason that state laws or private agreements should not be able to allocate *ultimate* financial responsibility in such a situation. Nor does public policy dictate that insurers of truck owners be absolved from risks they voluntarily assumed solely because the vehicle was leased to an interstate carrier.

Id. at 565 (citations omitted). Similarly, Empire may not escape liability that would otherwise be primary simply because Guaranty's policy contains an ICC endorsement.

IV. CONCLUSION

In summary, we hold that the effect of the ICC endorsement in Guaranty's policy is to negate limiting language in the body of the policy, including any applicable "excess coverage" clause, but that the endorsement does not make Guaranty's policy necessarily primary and supreme over Empire's policy. Rather, once limiting language is read out of Guaranty's policy, the two policies then must be compared pursuant to traditional state insurance and con-

tract law principles to determine how liability should be allocated. Accordingly, we VACATE the summary judgment and REMAND for a determination of how the risks should be allocated between Guaranty and Empire when all the provisions of both policies, including the ICC endorsement, are considered.



Bonnie GLENN and Glenn's Enterprises Inc., a Colorado Corporation,
Plaintiffs-Appellants,

v.

FIRST NATIONAL BANK IN GRAND JUNCTION, a Federal Banking Institution, Allen E. Heimer, Wayne Beede, and Carol Rodgers, Defendants-Appellees.

No. 87-1312.

United States Court of Appeals,
Tenth Circuit.

Feb. 15, 1989.

Action was brought alleging RICO violation. The United States District Court for the District of Colorado, Jim R. Carrigan, J., granted defendants' motion to dismiss, and appeal was taken. The Court of Appeals, Brorby, Circuit Judge, held that: (1) district court was not required to sua sponte allow amendment to the complaint, and (2) complaint failed to state RICO cause of action.

Affirmed.

1. Federal Civil Procedure ¶826

Trial court was not required to sua sponte allow plaintiffs to amend their complaint to state claim for relief prior to dismissal.

2. Federal Civil Procedure ¶824

Motion to dismiss for failure to state claim was not responsive pleading, and thus plaintiffs could have amended complaint as of right after they received such motion and prior to trial court's decision. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

3. Federal Civil Procedure ¶849

Plaintiffs' request, in response to defendant's motion to dismiss, for leave to amend complaint or file more definite statement with respect to particular areas court believed they had failed to state claim for relief, did not constitute motion for leave to amend; court had not yet ruled on motion to dismiss, and if plaintiffs had any grounds for amending, they could have amended as matter of right at time they issued their request. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

4. Commerce ¶82.72

Complaint failed to state RICO cause of action; factual assertions were not matched with elements of particular subsection of RICO statute, and allegations were too vague and conclusory to state claim for relief under RICO. 18 U.S.C.A. §§ 1961-1968.

Submitted on the briefs: *

Bradley P. Pollock of Bell & Pollock, P.C., Littleton, Colo., for plaintiffs-appellants.

Timothy P. Schimberg of Fowler & Schimberg, P.C., of counsel, Thomas J. Bissell, and Jane E. Westbrook, Denver, Colo., for defendants-appellees.

Before LOGAN, BRORBY and EBEL, Circuit Judges.

BRORBY, Circuit Judge.

Plaintiffs, Bonnie Glenn and Glenn's Enterprises, Inc. (Appellants), filed a complaint against the bank; two of the officers of the bank; and a guarantor. (The bank

and the bank officers hereinafter are referred to as Appellees.) Appellants asserted a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. §§ 1961-1968 (1984), and five pendent claims. Appellees filed a motion to dismiss the complaint pursuant to Fed.R. Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. Appellants filed a response to this motion, asking the trial court to require the defendants to answer, or, in the alternative, "that leave be given to the Plaintiffs to amend their Complaint or file a more definite statement with respect to those particular areas where the Court believes and/or determines that the Plaintiffs have failed to state a claim for relief."

Setting forth detailed reasons for its actions, the trial court dismissed the RICO claim under Fed.R.Civ.P. 12(b)(6), and dismissed the pendent claims for lack of jurisdiction. The order dismissing the complaint did not address Appellants' "request to amend" contained in their response to the motion to dismiss. Following the trial court's dismissal, Appellants did not file a motion for leave to amend under Fed.R. Civ.P. 15, nor a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e), nor a motion for relief from a judgment for mistake under Fed.R.Civ.P. 60(b), nor any other motion. Rather, Appellants chose to appeal. Appellants assert the trial court erred in not allowing them to amend their complaint. They assert further error in the trial court's refusal to review the introductory allegations contained in their complaint in order to match them with the elements of a RICO claim. We AFFIRM the decision of the trial court.

I

[1] Appellants state their first issue as follows: "Did the court error [sic] in its failure to allow the plaintiffs to amend their complaint to state a claim for relief prior to dismissing the subject case and

* After examining the briefs and the appellate record, this panel has unanimously determined that oral argument would not materially assist the determination of this appeal. See Fed.R.

App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

complaint?" Appellants contend that they moved for leave to amend and erroneously were denied that permission. In our view, no such motion was before the court. Appellants failed to exercise their *right* to amend prior to the trial court's decision, and also failed to move for *leave* to amend after the trial court granted the motion to dismiss, under Fed.R.Civ.P. 15, in conjunction with a motion under Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b). Because the district judge was not obliged to consider the matter, he committed no error.

[2] Fed.R.Civ.P. 15(a) provides that a party may amend its pleadings once as a matter of course at any time before a responsive pleading is served. Recognized pleadings are listed in Fed.R.Civ.P. 7(a) as a complaint, an answer, a reply to a counterclaim denominated as such, an answer to a cross-claim, a third-party complaint, and a third-party answer. "No other pleading shall be allowed." *Id.* Ordinarily, a motion to dismiss is not deemed a responsive pleading. *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir.1985). Consequently, Appellants could have amended as of *right* after they received the motion to dismiss and prior to the trial court's decision. Appellants failed to exercise their right to amend and chose instead to stand on their complaint.

After the court granted the motion to dismiss, Appellants could have amended their complaint only by leave of court or by written consent of the adverse party. Fed. R.Civ.P. 15(a); *O'Bryan v. Chandler*, 352 F.2d 987, 990 (10th Cir.1965), *cert. denied*, 384 U.S. 926, 86 S.Ct. 1444, 16 L.Ed.2d 530 (1966). Appellants could have filed a motion under Rule 15(a) in conjunction with a motion to amend the judgment under Fed. R.Civ.P. 59(e), or a motion for relief due to mistake under Fed.R.Civ.P. 60(b). Under Fed.R.Civ.P. 7(b), "[a]n application to the court for an order shall be made by motion which . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought." *Id.* Appellants failed to file any motion.

[3] In response to the Appellees' motion to dismiss, Appellants requested that the

court require the Appellees to answer, or, in the alternative, "that leave be given to the Plaintiffs [Appellants] to amend their Complaint or file a more definite statement with respect to those particular areas where the Court believes and/or determines that the Plaintiffs have failed to state a claim for relief." Appellants urge us to construe this request, made prior to the dismissal, as a motion for leave to amend. We decline to do so. In our view, Appellants' request does not rise to the status of a motion. The request is not an application for an order contemplated under the rules, and the request states no grounds let alone "particular" grounds for the request. If Appellants had *any* grounds for amending, they could have amended as a matter of *right* at the time they issued their request. Obviously, either they had no additional facts or they felt they had stated a claim.

Appellants could not file a request for leave to amend without first complying with Fed.R.Civ.P. 11. Rule 11 requires that the signature of an attorney on a pleading certify to the best of the signer's knowledge, information, and belief, formed *after* reasonable inquiry, that the pleading is well grounded in fact and is warranted by existing law or a good-faith argument for a change in the law. Furthermore, Rule 11 contemplates and demands an attorney's investigation of both the facts and the law, and this cannot be done when the attorney, as here, apparently does not know what is necessary to state a claim. Rule 11 applies to motions. *Wright & Miller, Federal Practice & Procedure* § 1191 at 34 (1971). The premature request for leave to amend was without basis and was a mere "shot in the dark." There could be no compliance with Rule 11 until Appellants first ascertained what was necessary to state a claim.

Because the issue was never before it, the district court did not refuse to permit Appellants to amend their complaint. For the same reason, we will not construe the court's silence as an implicit denial of a motion.

Appellants next urge us to grant leave to amend as a matter of right after dismissal as a "request" therefor was made prior to the court's dismissal. We cannot agree. If Appellants' theory were to be adopted, the pleading phase of a lawsuit would never end. Such a practice would undermine the distinctions in Fed.R.Civ.P. 15 between "right" to amend and "leave" to amend, and plaintiffs' counsel would then have the right to amend indefinitely simply by including a "request to amend" in their response to a motion to dismiss.

Under the facts of this case, we hold that Appellant did not move the court for leave to amend the complaint and therefore the district judge committed no error in not ruling thereon. A naked request for leave to amend asked for as alternative relief when a party has the unexercised right to amend is not sufficient. After a motion to dismiss has been granted, plaintiffs must first reopen the case pursuant to a motion under Rule 59(e) or Rule 60(b) and then file a motion under Rule 15, and properly apply to the court for leave to amend by means of a motion which in turn complies with Rule 7. In that event, in accordance with Rule 15, "leave shall be freely given when justice so requires." *Id.*; *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Furthermore, this court has allowed the plaintiff ten days after dismissal to amend the complaint. *Eames v. City of Logan*, 762 F.2d 83, 85 (10th Cir.1985); *Leggett v. Montgomery Ward & Co.*, 178 F.2d 436, 438 (10th Cir. 1949). Appellants availed themselves of none of their legal options. Appellants' failures are well beyond "mere technicalities" and this court will not protect them from their own inaction.

II

[4] Appellants state their second issue as follows: "Did the court error [sic] in its refusal to review the introductory allegations to determine if said allegations are sufficient to state a claim for relief?" The trial court reviewed all of Appellants' alle-

gations and liberally construed the complaint. The trial judge described Appellants' method of pleading as "shotgun" pleading and stated that he was not going to do Appellants' work for them to connect assertions with elements of all sections of the RICO law. Most importantly, the trial court found the allegations "too vague and conclusory to state a claim for relief under RICO." The trial court's order of January 16, 1987, thoroughly analyzed the RICO claim and concluded in part:

Plaintiffs have failed to state the facts that support the elements of their RICO claim within the allegations of their First Claim for Relief. I will not search through the several paragraphs of the plaintiffs' "Introductory Allegations" and attempt to match the factual assertions with the elements of all subsections of the RICO statute to determine if the complaint states a claim for relief. Neither will I require the defendants to "piece" together the plaintiffs' complaint. Plaintiffs are required to assert, in good faith and subject to Rule 11, Fed.R.Civ.P. the RICO subsection or subsections on which they rely and support each claim with allegations of fact.

Moreover, the plaintiffs' allegations are too vague and conclusory to state a claim under RICO.

The law recognizes a significant difference between notice pleading and "shotgun" pleading.

Apparently, even Appellants do not contend their purported RICO claim was sufficient. They neither contend nor establish in their brief that this "pleading" sets forth a claim as required by Fed.R.Civ.P. 8. Appellants cite two unpersuasive cases in support of their contentions on this issue: *New York State Waterways Ass'n, Inc. v. Diamond*, 469 F.2d 419 (2d Cir.1972), and *Rohler v. TRW, Inc.*, "576 F.2d 1260 (C.A.7th 1978)." ¹ In *New York State Waterways*, the court held that: "it is our duty to read [the complaint] liberally, to determine whether the facts set forth justify taking jurisdiction...." 469 F.2d at 421. In our case, the record indicates that the court did

1. *Rohler* was miscited as "576 P.2d 1260 (C.A.7th 1978)." We located the case at 576 F.2d 1260

(7th Cir.1978), and note that *Rohler* was not the only case miscited by appellants in their brief.

in fact liberally construe the complaint. The trial court's meticulous order recites in part as follows: "Plaintiffs have attempted to set forth the details of their action in the 'Introductory Allegations' section of their complaint. Liberally construing the complaint, it appears that..." Furthermore, Appellants' second issue is not a liberal construction issue, but whether the trial court was obligated to construct a cause of action from allegations in a complaint filed by a party who was unwilling or unable to plead the cause of action himself. Consequently, *New York State Waterways* does not apply to this case.

Likewise, *Rohler* is distinguishable. In *Rohler*, the court dismissed the complaint, but plaintiff filed a motion for reconsideration and for leave to file an amended complaint, complete with a proposed amended complaint. The trial court denied permission to amend. The circuit court reversed, holding the court must grant leave to amend to allow plaintiff to attempt to comply with the jurisdictional requirement. In this case, however, Appellants filed no motion for leave to amend, and they neither conceived nor produced a proposed amended complaint. Consequently, *Rohler* is distinguishable from this case on the facts.

Although Appellants did not designate the complaint as part of the record on appeal, we have obtained a copy of the complaint in accordance with 10th Cir.R. 10.2.4. After reviewing the record as supplemented by us, we conclude the trial court did not err in refusing to attempt to create order out of chaos. The complaint failed to state a claim under any conceivable matching of allegations.

Because Appellants neither made a showing in accordance with Rule 11 that they were able to amend and state a claim, nor filed a motion in accordance with Rule 7 showing with particularity the grounds therefor, we will not direct Appellants be given an opportunity to amend. The complaint failed to state a claim. The decision of the trial court as set forth in its order of January 16, 1987 is AFFIRMED.

Karen L. HOKANSEN, *fka* Karen L. Neil;
Cecile Lou Browning, heir-at-law and
next of kin of Aimee Uffner, deceased
minor, Cecile Lou Browning, Successor
To Randall J. Price, Special Adminis-
trator of the Estate of Aimee Uffner,
deceased; Amalia R. Zapata; and Ama-
lia R. Zapata, Plaintiffs/Appellants,

v.

UNITED STATES of America,
Defendant/Appellee.

Nos. 86-2136, 86-2137, 86-2139
and 86-2140.

United States Court of Appeals,
Tenth Circuit.

Feb. 16, 1989.

Victim of shooting and representatives of deceased victims brought Federal Tort Claims Act action against United States alleging that Veterans Administration hospital negligently breached duty to victims to prevent release of voluntary psychiatric inpatient because he had known general history of mental and emotional problems which included violent tendencies. The United States District Court for the District of Kansas, Sam A. Crow, J., dismissed action. Plaintiffs appealed. The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that hospital did not have duty under Kansas law not to release voluntary patient, and thus, hospital could not be held liable for damages.

Affirmed.

Holloway, Chief Judge, filed a dissenting opinion.

1. Mental Health — 414(3)

Under Kansas law, Veterans Administration hospital did not have duty to prevent release of voluntary psychiatric inpatient on basis of known general history of mental and emotional problems which in-

[3] A number of public policy concerns underlie the need for grand jury secrecy.¹ Disclosure of certain grand jury materials to Dr. Chadwick to enable him to express his expert opinion concerning the cause of the child's death to the grand jury in no way contravened any of these policies. The government could have familiarized Dr. Chadwick with the facts surrounding the child's death by posing a complex hypothetical question. In the circumstances presented, this approach would have been unduly cumbersome. The most expeditious and reliable way for Dr. Chadwick to prepare for his expert testimony was to review transcripts of the testimony of prior grand jury witnesses and examine other evidence presented to the grand jury. Since he examined these materials under court supervision, sufficient safeguards existed to prevent abuse of the procedure.

Additionally, Fed.R.Crim.P. 6(e)(3)(C)(i) provides that a court may order disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding." We need not decide whether a grand jury proceeding is "a judicial proceeding" under Rule 6(e), as it seems clear that grand jury proceedings are at least preliminary to a judicial proceeding. *United States v. Stanford*, 589 F.2d 285, 292 (7th Cir. 1978).² We

conclude that in the circumstances presented, the examination by Dr. Chadwick of grand jury materials was proper and the district court did not abuse its discretion by authorizing such disclosure under Rule 6(e).

[4] Mayes's motion to dismiss the indictment because only eleven grand jurors attended every session raises an issue whose resolution is controlled by *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645 (9th Cir. 1980).

AFFIRMED.



Milton MEUDE, Plaintiff-Appellant,
v.

DUN & BRADSTREET, INC.,
Defendant-Appellee.

No. 80-5711.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 7, 1982.

Decided Feb. 25, 1982.

Plaintiff brought suit seeking damages and injunctive relief from defendant for

grand jury materials to Dr. Chadwick was improper under Rule 6(e)(3)(C)(i). *Tager* involved the propriety of a subsection (C)(i) disclosure of grand jury materials to a private, nongovernmental investigator to enable him further to assist governmental attorneys in an ongoing investigation. The court noted that a governmental attorney's need for assistance in the enforcement of federal criminal law is addressed, not by subsection (C)(i), but by subsection (A)(ii) of Rule 6(e) which limits disclosure to "government personnel." 638 F.2d at 170. Without expressing a view as to the correctness of the *Tager* decision, we note that Dr. Chadwick was not called upon to assist governmental attorneys as a private investigator in an ongoing investigation, but was asked to express his expert medical opinion based in part on certain evidence previously presented to the grand jury. As such Dr. Chadwick's expert testimony before the grand jury did not come within the provisions of subsection (A)(ii).

1. Reasons for grand jury secrecy are stated in *United States v. Proctor and Gamble*, 356 U.S. 677, 681-682 n.6, 78 S.Ct. 983, 985-986 n.6, 2 L.Ed.2d 1077 (1958), quoting *United States v. Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954): "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

2. Citing *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), Mayes maintains that disclosure, under judicial supervision, of certain

alleged improper consumer credit reporting pursuant to California Consumer Credit Reporting Agencies Act. Action was filed in state court and removed to the United States District Court for the Central District of California, which Court, Terry J. Hatter, Jr., J., granted summary judgment against plaintiff, and plaintiff appealed. The Court of Appeals, Ferguson, Circuit Judge, held that: (1) trial court did not abuse its discretion in denying plaintiff's motion to file amended complaint; (2) commercial credit report published by defendant was not a "consumer credit report" within meaning of the California Act; and (3) defendant was not a "consumer credit reporting agency" under the California Act.

Affirmed.

1. Federal Civil Procedure ⇐828

Federal Courts ⇐817

Allowance of leave to amend lies within discretion of trial court and is reviewable only for abuse of discretion.

2. Federal Civil Procedure ⇐830, 832

Trial court did not abuse its discretion in denying plaintiff's motion to file amended complaint, in view of plaintiff's delay in answering interrogatories as ordered by the court, 25-month delay between filing of initial complaint and motion to amend, discovery of no new facts, revival of some previously used theories, and further preparation that admission of new causes would require.

3. Consumer Credit ⇐16

Credit information published by defendant concerning business entities or individuals engaged in business in their business capacities, and not as consumers was not a "consumer credit report" within meaning of California Consumer Credit Reporting Agencies Act, as would subject defendant to liability for disseminating false or obsolete information about consumer.

* Honorable Stanley A. Weigel, United States District Judge, Northern District of California,

West's Ann.Cal.Civ.Code § 1785(c) (Repealed).

See publication Words and Phrases for other judicial constructions and definitions.

4. Consumer Credit ⇐16

Defendant which published credit information concerning business entities or individuals engaged in business in their business capacities, and not as consumers, was not a "consumer credit reporting agency" under California Consumer Credit Reporting Agencies Act, as would subject defendant to liability for disseminating false or obsolete information about consumer. West's Ann.Cal.Civ.Code § 1785.3(d).

See publication Words and Phrases for other judicial constructions and definitions.

Michael J. Schwartz, Law Offices of Michael J. Schwartz, Canoga Park, Cal., for plaintiff-appellant.

Edwin Freston, Los Angeles, Cal., argued, for defendant-appellee; Lew W. Cramer, Los Angeles, Cal., on brief.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and FERGUSON, Circuit Judges, and WEIGEL,* District Judge.

FERGUSON, Circuit Judge:

I. BACKGROUND

In 1978, plaintiff Mende filed a complaint against defendant Dun & Bradstreet in the state superior court. A month later the complaint was removed to federal district court under diversity jurisdiction. Plaintiff's complaint sought damages and injunctive relief from Dun & Bradstreet for alleged improper consumer credit reporting pursuant to the California Consumer Credit Reporting Agencies Act, Cal.Civ.Code § 1785 *et seq*. Plaintiff's four causes of action were for (1) reporting obsolete credit

sitting by designation

information, (2) reporting inaccuracies in consumer reports, (3) failure to reinvestigate or delete inaccurate or unverifiable information, and (4) an injunction against the issuance of defendant's reports.

Dun & Bradstreet filed an answer denying, *inter alia*, that it had an obligation to comply with the pertinent sections of the California Consumer Credit Reporting Agencies Act ("California Act").

Dun & Bradstreet subsequently filed an amended answer that did not raise any new defenses but that included a counterclaim for attorneys' fees. On June 10, 1980, the district court granted a motion of defendant for an order compelling plaintiff to answer interrogatories and for attorneys' fees in the amount of \$300.

Three days later, plaintiff filed a notice of a motion for leave to file an amended complaint. Plaintiff's proposed amended complaint added new theories based on federal statutes, the United States Constitution, libel and negligence laws.

Defendant filed various affidavits in support of its motion for summary judgment. The district court denied plaintiff's motion to amend his complaint and granted summary judgment against plaintiff. The district court concluded that Dun & Bradstreet is not a business entity within the provisions of the California Act and, in particular, is not a "consumer credit reporting agency" within the meaning of the Act.

This appeal presents two issues:

1. Was it an abuse of discretion for the trial court to deny plaintiff's motion to file an amended complaint?
2. Did the district court properly grant summary judgment against plaintiff?

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING PLAINTIFF'S MOTION TO FILE AN AMENDED COMPLAINT

[1] The allowance of leave to amend lies within the discretion of the trial court and

1. Plaintiff did not inform the court below that some of the issues in the proposed amended complaint had been raised 14 years earlier in *Mende v. Union*, Los Angeles Superior Court

is reviewable only for an abuse of discretion. *Izaak Walton League of America v. St. Clair*, 497 F.2d 849 (8th Cir. 1974). See also *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 912 (7th Cir. 1973). The only question here is whether the court abused its discretion in denying plaintiff's motion to amend.

[2] In the instant case, the complaint was filed in federal court on April 24, 1978. The plaintiff filed a notice of a motion for leave to amend on June 13, 1980, 25 months after the original complaint. The amended complaint is brought only to assert new theories, not because any new facts came to plaintiff's attention. It is worth noting that the amended complaint was filed three days after the court ordered plaintiff to answer interrogatories, to deliver them to defendant no later than July 25, 1980, and to pay defendant \$300 in attorney's fees. Thus, the court apparently believed there had been undue delay even before plaintiff filed his amended complaint. It is also noteworthy that plaintiff filed a lawsuit against defendant in 1966 asserting causes of action for libel, slander, invasion of privacy, and interference with business relationships.¹ In view of plaintiff's delay in answering interrogatories, the 25-month delay between the filing of the initial complaint and the motion to amend, the discovery of no new facts, the revival of some previously used theories, and the further preparation that the admission of new causes would require, we conclude that the trial court did not abuse its discretion by denying leave to amend.

III. DID THE DISTRICT COURT PROPERLY GRANT SUMMARY JUDGMENT?

Plaintiff argues that two genuine issues of material fact stood in the way of summary judgment: (A) Whether Dun & Bradstreet reports are consumer credit reports, and (B) whether Dun & Bradstreet is a

Action No 885 836 (filed May, 1966), which was dismissed for failure to timely amend. Dun & Bradstreet was also named as a defendant in that case.

consumer credit reporting agency. The significance of these question is that an affirmative answer to each could subject Dun & Bradstreet to liability under the California Act for disseminating false or obsolete information about a consumer.

A. The Dun & Bradstreet Reports in Issue Are Not Consumer Credit Reports Within the Meaning of the California Act.

The California Act defines a "consumer credit report" as:

any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal family or household purposes, or (2) employment purposes, or (3) other purposes authorized in Section 1785.11.

Cal.Civ.Code § 1785(c) No California case construes the term "consumer credit report" in the California Act; the parties therefore have examined the construction of the virtually identical phrase "consumer report" in the Federal Fair Credit Reporting Act ("Federal Act"), 15 U.S.C. § 1681 *et seq.* The legislative history of the Federal Act supports the proposition that the definition does not cover business credit reports. S.Rep.No. 91-517, 91st Cong., 1st Sess. (1969) (Committee on Banking & Currency).

Defendant maintains that the Dun & Bradstreet Reports relate to the business entities in which plaintiff participated. Moreover, defendant has filed affidavits to the effect that it only provides credit information concerning business entities or individuals engaged in their business capacities. The affidavits indicate that Dun & Bradstreet has not prepared consumer reports since 1974. Dun & Bradstreet also requires that its subscribers sign an agreement that they will use reports on businesses only as a

basis for credit to businesses in their capacity as such.

The instant case is like *Wrigley v. Dun & Bradstreet*, 375 F.Supp. 969 (W.D.Ga.1974), in which the court granted summary judgment against Wrigley on the following findings and conclusions:

... The Court finds that the undisputed facts of the instant action are that Dun & Bradstreet issued its credit report on Wrigley Construction Co. for Dun & Bradstreet subscribers to use in deciding whether to extend commercial credit to Wrigley Construction Co. It is therefore clear that the Fair Credit Reporting Act would not ordinarily apply to the credit report issues on Wrigley Construction Co.

* * * * *

... Dun & Bradstreet issued a credit report on Wrigley Construction Co. which contained information on the personal financial situation of Mr. Wrigley. The credit report issued was for the extension of commercial credit and the Fair Credit Reporting Act therefore does not apply. Accordingly, the Court grants Dun & Bradstreet's motion for summary judgment.

Id. at 970, 971 (footnote omitted).

Mende filed no competent evidence in the trial court opposing the Dun & Bradstreet affidavits. He made no showing whatsoever that the reports were used for consumer purposes. The trial court properly used the affidavits to find that there was no genuine issue of material fact as to whether Dun & Bradstreet issued a consumer credit report. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine issue of fact." Notes of Advisory Committee on Rules, Fed.R.Civ.Proc. 56(e).

[3] Plaintiff suggests that the reports here at issue "could" have been used as consumer credit reports, and on that basis argues for the application of the very expansive definition of consumer credit report in *Belshaw v. Credit Bureau of Prescott*,

392 F.Supp. 1356 (D.Ariz.1975).² *Belshaw* held that

"consumer report" must be interpreted to mean any report made by a credit reporting agency of information *that could be used* for one of the purposes enumerated in § 1681a.

Id. at 1359-60 (emphasis in the original). The *Belshaw* definition depends on whether information could be used for certain purposes, not on whether it is collected for certain purposes. This expansive interpretation of consumer report has been criticized as bringing "within the coverage of the Act any gathering of information about an individual, even if the context were such clearly non-consumer activities as engagement in profit-making transactions . . . or litigation against a defendant whose insurer requests a report . . ." *Henry v. Forbes*, 433 F.Supp. 5, 9 n.5 (D.Minn.1976).

Here there was no evidence that the reports were used for any other purpose than their intended purpose as commercial credit reports. We do not believe that the mere fact that a report could be used as a consumer report is enough to make it one. More is required; however, we reserve the question of just what additional showing is required until a case properly presents the issue.

In passing, we note that the present case is very different from *Beresh v. Retail Credit Co.*, 358 F.Supp. 260 (C.D.Cal.1973). *Beresh* held that reports prepared by a consumer-reporting agency for the purpose of determining whether an insured was disabled, and purportedly used by the insurer for the purpose of terminating monthly

2. *Belshaw* is easily distinguishable on its face from the present case and from other cases that have applied more restrictive interpretations to the Federal Act. Indeed, *Belshaw* expressly distinguished previous cases, including *Wrigley v. Dun & Bradstreet, Inc.*, 375 F.Supp. 969 (N.D.Ga.1974), that had construed the Federal Act more narrowly:

In those cases the Act was construed as not applicable to reports made by credit reporting agencies on individuals where a corporation or business in which the individual was a principal had applied for credit or insurance. Those cases are readily distinguishable from the present case in two respects.

payments, were "consumer reports" within the meaning of the Federal Act. The court reasoned that the reports were consumer reports within the meaning of the Federal Act because they were used "in connection with a business transaction involving a consumer." 358 F.Supp. at 262. In *Beresh*, there was no dispute that the credit agency was a "consumer reporting agency" within the meaning of 15 U.S.C. § 1681a(f). Second, *Beresh* was a consumer who had bought personal insurance. In contrast, *Dun & Bradstreet* disputes that it is a consumer reporting agency. Moreover, *Dun & Bradstreet* claims that its reports relate to *Mende* only in his business capacity, not his individual consumer capacity. Thus, *Beresh* is clearly distinguishable.

B. *Dun & Bradstreet* Is Not a Consumer Credit Reporting Agency.

[4] The California Act defines "consumer credit reporting agency" to mean

any person who, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties

Cal.Civ.Code § 1785.3(d). As discussed above in subpart III(A), *Dun & Bradstreet* affidavits show that its credit information concerns business entities or individuals engaged in business in their business capacities, and not as consumers. On the basis of these affidavits, it appears that *Dun &*

First, if an individual chooses to do business as a corporation in order to limit his liability, he must not expect the same degree of privacy as other individuals when applying for credit. He could apply for credit as an individual and retain the protection of the Act if he wishes. Second, in each of these cases, the individual was aware that his company had applied for credit or insurance and might be investigated.

392 F.Supp. at 1360. The report in *Belshaw* was made with respect to the plaintiff as an individual consumer; the *Dun & Bradstreet* reports in the instant case are made with respect to *Mende* in his business capacity.

Bradstreet is not a consumer credit reporting agency. Under the Federal Act, if a reporting entity is not a consumer reporting agency within the meaning of the Act, then such entity cannot be held to have violated the statute, and dismissal is required. *Belshaw v. Credit Bureau of Prescott*, *supra*, at 1361. The same result should follow under the California Act.

CONCLUSION

First the district court did not abuse its discretion by denying plaintiff's motion to amend his complaint. Second, the district court properly granted summary judgment because there was no genuine issue of material fact. Defendant's affidavits, which were not controverted by any affidavits or other evidentiary material filed by Mende, were sufficient to show that Dun & Bradstreet does not issue consumer credit reports and that it is not a consumer credit reporting agency within the meaning of the California Act.

AFFIRMED.



**Marcella CSIBI, Ludovic Csibi, Aurora
Csibi and Maria Csibi,
Plaintiffs-Appellants,**

v.

**Gizela FUSTOS, etc.,
Defendants-Appellees.**

No. 81-4100.

**United States Court of Appeals,
Ninth Circuit.**

Argued and Submitted Oct. 14, 1981.

Decided Feb. 26, 1982.

Action was brought by decedent's alleged first wife and her children to establish their rights in decedent's estate. The United States District Court for the North-

ern District of California, William W. Schwarzer, J., dismissed action, and wife and children appealed. The Court of Appeals, Lucas, District Judge, sitting by designation, held that action, in which all recovery hinged on determination of marital status, was within historic domestic relations exception to diversity jurisdiction, and thus District Court lacked subject-matter jurisdiction over dispute.

Order vacated and action dismissed for lack of jurisdiction.

1. Federal Courts ⇌ 30, 622

Lack of subject-matter jurisdiction can be raised on court's own motion at any time, and can be raised for first time on appeal.

2. Federal Courts ⇌ 8, 284

Domestic relations cases are within the Article III judicial power of the federal courts, but outside power bestowed by Congress in diversity statute 28 U.S.C.A. § 1332(a)(2); U.S.C.A.Const.Art. 3, § 1 et seq.

3. Federal Courts ⇌ 284

States have interest in family relations superior to that of federal government, and state courts have more expertise in field of domestic relations, and thus no federal diversity subject-matter jurisdiction exists over domestic disputes. 28 U.S.C.A. § 1332(a)(2).

4. Federal Courts ⇌ 47

Federal courts may exercise their discretion to abstain from deciding cases in which domestic relations problems are involved tangentially to other issues determinative of case. 28 U.S.C.A. § 1332(a)(2).

5. Federal Courts ⇌ 284

Where case turned on marital status of decedent and his alleged first and second wives, where first wife had to establish her own status as decedent's legal spouse and disprove second wife's status as good faith putative spouse in order to recover, and where part of first wife's prayer for relief was request for annulment of second mar-

careful and explicit on this subject. If the ALJ rejected such evidence then he would have dealt with this subject in an explicit fashion. *Gee v. Celebrezze*, 355 F.2d 849 (7th Cir. 1966); *Hicks v. Gardner*, 393 F.2d 299 (4th Cir. 1968); *Cutler v. Weinberger*, 516 F.2d 1282 (2d Cir. 1975).

The comment in *Cutler v. Weinberger*, 516 F.2d 1282, 1286 (2d Cir. 1975), has pointed application here:

"While the determination of another governmental agency that a social security disability benefits claimant is disabled is not binding on the Secretary, it is entitled to some weight and should be considered. See *Robinson v. Richardson*, 360 F.Supp. 243, 249 (E.D.N.Y.1973); *Zimbalist v. Richardson*, 334 F.Supp. 1350, 1355 (E.D.N.Y.1971); *Pendergraph v. Celebrezze*, 255 F.Supp. 313, 321 (M.D.N.C. 1966)."

[11] The principles announced by this Court in *Lonzollo v. Weinberger*, 534 F.2d 712 (7th Cir. 1976), and *Daniels v. Mathews*, 567 F.2d 845 (8th Cir. 1977), requires the remand of this case to give the Secretary an opportunity to consider and make findings on the subject of the state's separate determination of disability.

Again on this issue, even minimal advocacy would suggest arguing for the decision by the Secretary to be consistent with the state's separate determination of disability. On remand such will be possible.

On remand, the claimant must be given an opportunity to develop evidence relating to her total physical and mental problems, including obesity and mental illness, as the same may bear on the question of disability.

Therefore, the decision of the District Court is REVERSED and this case is REMANDED for proceedings consistent with this order.



* This appeal was originally decided by unreported order on August 21, 1978. See Circuit Rule

Gordon D. MERTENS, Sr., and Marcella Mertens, Plaintiffs-Appellants,

v.

Ralph HUMMELL, Individually and as Chief of Police of Barrington Hills et al., Defendants-Appellees.

No. 77-1734.

United States Court of Appeals,
Seventh Circuit.

Argued June 14, 1978.

Decided Aug. 21, 1978.*

Opinion Nov. 17, 1978.

Appeal was taken in a civil action from an order of the United States District Court for the Northern District of Illinois, Bernard M. Decker, J., dismissing the suit for noncompliance by plaintiffs with pretrial discovery orders and denying leave to file a third amended complaint. The Court of Appeals held that the trial court's actions did not involve abuse of discretion.

Affirmed.

Federal Civil Procedure § 839, 1741

No abuse of discretion was involved in trial court's action in refusing to permit plaintiffs in civil action to file third amended complaint and in dismissing suit on ground that plaintiffs had failed to comply with pre-discovery orders. Fed.Rules Civ. Proc. rule 37(b), 28 U.S.C.A.; U.S.Ct. of App. 7th Cir. Rule 35, 28 U.S.C.A.

Eliot A. Landau, Woodridge, Ill., for plaintiffs-appellants.

James R. Schirott, David R. Novoselsky, Chicago, Ill., for defendants-appellees.

Before CUMMINGS, SPRECHER and BAUER, Circuit Judges.

35. The court has subsequently decided to issue the decision as an opinion.

PER CURIAM.

The court, having read the briefs, addressed itself to the record, and heard oral arguments, finds no abuse of discretion and no violation of constitutional rights in the lower court's order dismissing the appellants' case under Rule 37(b) for noncompliance with pre-trial discovery orders. Similarly, we find no abuse of discretion in the lower court's denial of leave to file a third amended complaint.

Accordingly, for the reasons set forth in the district court's memorandum opinion, that opinion is affirmed and adopted as the opinion of this court. Costs are awarded to the appellees.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO 75 C 88

GORDON MERTENS, SR., et al,

Plaintiff,

v

RALPH HUMMELL, et al

Defendants

MEMORANDUM OPINION

There is pending before the court a motion by certain defendants in this case to dismiss the instant action pursuant to F.R. Civ.P. 37(b)(2)(C) and 37(d).

This motion accords with the report of Magistrate Balog, dated April 6, 1977, which recommended that the action be dismissed. The magistrate's report noted that the plaintiffs had failed to comply with several orders to produce discovery materials. Magistrate Balog also commented that the plaintiffs had failed to comply with an order to prepare a first draft of the final pretrial order for this case.

On November 10, 1976, the defendants filed a request to produce certain materials. This included a request (No. 5) for

"[a]ny and all statements, transcriptions, records, notes, memoranda or other documents of interviews with witnesses to the

said occurrence, persons present before or after said occurrence, persons who have knowledge of said occurrence, persons who have knowledge of the allegations of the plaintiffs' complaint and persons who have knowledge concerning the plaintiffs' physical or mental condition before, during and after the said occurrence."

The record indicates that the defendants repeated their insistence upon compliance with this discovery request by letter and orally at various depositions.

Since the filing of this discovery request, there have been repeated court orders compelling the plaintiffs' compliance. On January 26, 1977, this court ordered "plaintiff to produce records to defendants." On February 11, 1977, Magistrate Balog ordered "[p]laintiff to produce all documents on Defendant's outstanding notice to produce including . . . a list of all potential witnesses who have given statements". On March 3, 1977, the magistrate ordered

"that if the plaintiffs are claiming that any of the statements, transcriptions, records, notes, memoranda or other documents of interviews with witnesses, as requested in paragraph 5 of the November 10, 1976 request for production, are privileged from discovery, that the plaintiffs produce all such statements, transcriptions, records, notes, memoranda or other documents of interviews with witnesses to this court for an in-camera inspection for further disposition by this court." (Emphasis added.)

The plaintiffs acknowledge the entry of these orders but maintain that they have complied with them. Their counsel concedes that he never submitted the list of potential witnesses' statements but maintains this was "due to the fact that no such statements existed.¹ [Emphasis in original.] That further, the only memoranda or notes available to the Plaintiffs' attorneys were notes of the personal communications

these contracts have ever been reduced to writing during the entire 28 month period during which this litigation has been pending

1. Counsel for the plaintiffs asserts that, although various witnesses have been contacted, no statements, notes or memoranda relating to

with the Plaintiffs, which were not the subject of Defendants' paragraph 5 of their Request for Production."

It is apparently agreed by the parties that an attorney from plaintiffs' counsel's office represented to the magistrate on February 11, 1977, that their office did possess certain notes, but asserted that they were privileged and exempt from discovery. Plaintiffs' lead counsel, who was not present on this occasion asserts that his associate had advised the court that these notes were limited to statements made by the plaintiffs. There is no supporting affidavit from Mr. Pellegrini, the associate who made the disputed representation. Defendants' counsel, who was present in court on February 11th, maintains under oath that Pellegrini "stated in open court that the plaintiffs did have memoranda of interviews with witnesses as sought in paragraph 5." It is also evident that Magistrate Balog was neither persuaded that the materials admittedly in plaintiffs' possession were privileged, nor that plaintiffs did not have materials covered by the discovery request. Thus, he entered on that day the order requiring production of a list of potential witnesses who had given statements, and later required an in camera inspection

2. The plaintiffs apparently never furnished any written explanation of their position (i. e. that they had never reduced any statement or contact with witnesses to writing) until after the magistrate had found that their conduct merited dismissal. Had they made these representations in a timely fashion to the magistrate he would have been able to fashion discovery orders which took these circumstances into consideration. (E. g. he might have required the plaintiffs to compile a list of all witnesses who had been previously contacted and to submit a detailed summary of the testimony that each witness would give if called at trial.) By choosing to ignore the discovery requests and the court orders without explanation, the plaintiffs obstructed the ability of the magistrate to perform his functions.

3. The statements and conduct of plaintiffs' counsel appear to contradict the argument that counsel had consistently and unambiguously denied possessing any statements, memoranda, or notes of interviews with witnesses.

prior to a determination of the existence of any privilege.

In any event, there can be no dispute that the plaintiff never complied with the order to supply a written list of witnesses who have given statements.² Their current denial of the existence of any such witnesses is not sufficient to comply with the magistrate orders.³

Furthermore, the magistrate expressly stated that he reserved the ultimate determination of the validity of any claimed privilege for notes or statements in the possession of the plaintiffs. There is no dispute that plaintiffs did not submit the notes of plaintiffs' statements in their possession for an in camera inspection, as mandated by the March 3rd order. The court therefore finds that it must sustain the magistrate's finding that the plaintiffs have failed to comply with the orders regarding the production of records.⁴

Finally, there appears to be no dispute that the plaintiffs have failed to comply with the order to prepare a first draft of the final pretrial order.

The Federal Rules of Civil Procedure allow the court to enter an order dismissing the action as a sanction where "a party fails to obey an order to provide or permit discovery." F.R.Civ.P. 37(b)(2)(C). Rule 41(b)

On January 21, 1977, plaintiffs' counsel responded to a request for this paragraph 5 material by saying, "We will review what statements that we may have on this, and we'll advise you by Tuesday as to any statements, transcriptions, or notes other than attorney's notes that fall within the purview of paragraph No. 5."

As late as March 25, 1977, plaintiffs' counsel was still promising to "comply with paragraphs 5, 10 and 11 in more elaborate style."

Neither statement fits in well with the assertion made in court by plaintiffs' counsel that the consistent practice of his office had been to avoid reducing to writing any information provided by witnesses. Assuming that counsel was aware of this practice of his own office, these statements must be viewed as extremely evasive.

4. The possibility that the plaintiffs have by now expended over \$24,000 in legal fees and expenditures in this case is, of course, utterly without relevance to the matter of counsel's compliance with the orders of the court.

provides for the dismissal of an action where the plaintiff has failed to comply with "any order of the court." Dismissal is, of course, an extremely harsh sanction. The instant case, however, provides a rare example of a situation in which such a sanction is in fact merited. A review of the extensive docket sheet in this case, a copy of which is attached hereto, underscores the difficulties which this case has already created. The conduct of the plaintiffs has already necessitated the order referring this case to a magistrate. By that order, dated December 22, 1976, Magistrate Balog was given "the power to impose appropriate sanctions upon any party who fails to fully cooperate with the magistrate in the formulation of the pretrial order, or who in any other way fails to comply with the instant order."

A careful consideration of the record in this case, including the briefs of the parties and the exhibits introduced with respect to the instant motion to dismiss, persuades the court that Magistrate Balog was well justified in recommending the dismissal of the instant complaint with prejudice.

The plaintiffs have also sought leave to file their "third amended complaint," as well as a commensurate extension of time for discovery.

Under F.R.Civ.P. 15(a) a party is entitled to only one amended pleading as a matter of course. Subsequent amendments are permitted "only by leave of court or by written consent of the adverse party." The determination of the appropriateness of additional amended pleadings "is within the discretion" of the trial court. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (dictum), cited in *Zenith*

Radio Corp. v. Hazeltine Research, 401 U.S. 321, 330, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

The court is aware that the spirit of the rule is tolerant towards such amendments. Rule 15(a) states that "leave shall be freely given when justice so requires." A trial court is obligated to act in this spirit, and may not deny such leave "without any justifying reason." *Foman v. Davis*, *supra*.

This does not mean, however, that the right to amend is absolute. "The requirement of judicial approval suggests that there are instances where leave should not be granted." *Klee v. Pittsburgh & W. Va. Rwy. Co.*, 22 F.R.D. 252, 255 (W.D.Pa.1958). *Foman v. Davis* states that leave is inappropriate where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." 371 U.S. at 182, 83 S.Ct. at 230. In *Zenith v. Hazeltine Research*, *supra*, the court stressed that in deciding a Rule 15(a) motion "the trial court was required to take into account any prejudice that Zenith would have suffered as a result." 401 U.S. at 331, 91 S.Ct. at 802.

The proffered "third amended complaint" is in fact the fifth complaint presented by these plaintiffs to the court.⁵ This pleading is 93 pages long and consists of 293 paragraphs. The complaint contains sixty-one counts asserted against twenty-five different defendants. These defendants include individuals previously dismissed from the case as well as new parties; in all twenty defendants would be added to those presently in the case.⁶

motion for leave to file this complaint was filed on May 3, 1977.

5. The original complaint was filed on January 10, 1975. The first complaint was dismissed on March 7, 1975. The first amended complaint was dismissed on May 23, 1975. Plaintiffs were denied leave to file a proffered second amended complaint on October 15, 1975. The instant second amended complaint was filed on November 3, 1975, and plaintiffs were permitted to reinstate the Village of Barrington Hills as a party defendant on March 10, 1976. The

6. The plaintiffs would reinstate their claims against various prosecutors, add additional police defendants, as well as the Sheriff of Lake County, and institute claims against a local newspaper, and its managing editor-reporter-photographer.

This proffered complaint is submitted nearly two and a half years following the inception of the case. In determining the appropriateness of granting leave, the court cannot be oblivious of the record of plaintiffs' conduct in this litigation prior to this point. When the repeated pleadings, the repeated scorn for court orders, the repeated requests for extensions of discovery are considered, a finding of prejudice to the current defendants is ineluctable.⁷ The difficulties in bringing this action into a posture fit for trial have already necessitated the dismissal of several complaints, and a transfer of this case to the magistrate. The introduction of new parties and new factual controversies at this point will only exacerbate the prior problems. The concomitant request for an extension of discovery is a red flag as to the undue delay that the filing of this complaint would generate.⁸

Accordingly, it is hereby ordered that the instant (second amended) complaint be dismissed with prejudice for the reasons stated above. Furthermore, the request of the plaintiffs to file a fifth complaint in this action is hereby ordered denied.

s/s Bernard M. Decker

United States District Judge

Dated May 13, 1977.



Michael SUSMAN, Plaintiff-Appellant,

v.

LINCOLN AMERICAN CORP. et al.,
Defendants-Appellees.

Ann FLAMM and Arnold FLAMM,
Plaintiffs-Appellants,

v.

Rudolph EBERSTADT, Jr. and MICRO-
DOT, INC., Defendants-Appellees.

Nos. 78-1293, 78-1310.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 14, 1978.

Decided Oct. 23, 1978.

As Amended Nov. 20, 1978.

Rehearing and Rehearing In Banc
Denied Dec. 5, 1978.

The United States District Court for the Northern District of Illinois, Joel M. Flaum, J., dismissed two class action complaints as moot after the defendants tendered to the named plaintiffs their full monetary damages. Appeals were consolidated, and the Court of Appeals, Fairchild, Chief Judge, held that: (1) where a motion for class certification had been pursued with reasonable diligence and was pending before the district court, the case did not become moot merely because of the tender to the named plaintiffs of their individual money damages; (2) the district court should have heard and decided the motion for class certification before deciding whether or not the case was mooted by the tender of money damages; (3) under Delaware law, a derivative suit for money damages brought on behalf of one corporation and against another could not survive the merger of the corporations, and (4) a derivative suit against third parties commenced prior to the merger of corporation on behalf

7. These defendants are entitled to a prompt resolution of the long standing claims against them. Of course, the additional prejudice to the proposed defendants who have been previously dismissed from this action is self-evident.

8. This court recognized that the undue delaying effect of tardy amended pleading requires a denial of leave to amend in *Forum v. Fidelity & Deposit*, No. 74 C 3747.

doors to all complaining stockholders without requiring them to show that it was impossible to obtain redress through regular corporate action, litigation of this kind would be endless." 187 Md. at 192, 49 A.2d at 453. If substantive opposition retroactively excuses demand, why would any investor demand action? If the firm opposed the suit, then the opposition would show the futility of demand; if however the firm embraced and prosecuted the plaintiff's claim, then the plaintiff would receive all the relief the court could have awarded. Demand would be defunct. Yet Maryland says that demand is the norm. It must follow that the directors' substantive opposition does not obviate demand.

For the reasons given in our initial opinion, 908 F.2d at 1347-50, the district court's judgment is reversed to the extent it held that Kamen is not entitled to pursue a direct action under § 36(b) of the Investment Company Act. The Supreme Court denied the Fund's petition for certiorari to review that aspect of our decision, — U.S. —, 111 S.Ct. 558, 112 L.Ed.2d 565 (1990), as it denied Kamen's petition to the extent it sought review of our holding, 908 F.2d at 1350-51, that she is not entitled to a jury trial of her claim under § 36(b), — U.S. —, 111 S.Ct. 554, 112 L.Ed.2d 561 (1990). The case is remanded for further proceedings under § 36(b). The judgment is affirmed to the extent it holds that Kamen's failure to make a demand on the Fund's directors blocks a derivative action under § 20(a).



Marie PERKINS and George Gaynor,
Plaintiffs-Appellants,

v.

Marshall SILVERSTEIN, individually and in his capacity as an administrator for the Cook County Forest Preserve District, George Dunne, individually and in his capacity as a President and Commissioner for the Cook County

Forest Preserve District, Steve Castans, individually and in his capacity as Chief of the Cook County Forest Preserve District Police Department, Chris Siragusa, individually and in his capacity as a Lieutenant for the Cook County Forest Preserve District, John Gabhart, individually and in his capacity as an administrator for the Cook County Forest Preserve District, James Gaughan, individually and in his capacity as an administrator for the Cook County Forest Preserve District, Lewis Kortas, individually and in his capacity as a Sergeant for the Cook County Forest Preserve District, Edward Connelly, individually and in his capacity as a Lieutenant for the Cook County Forest Preserve District, Bruce Quintos, individually and in his capacity as a Lieutenant for the Cook County Forest Preserve District, G. Palacios, individually and in his capacity as a Lieutenant for the Cook County Forest Preserve District, Sgt. Lawrence, individually and in his capacity as a Sergeant for the Cook County Forest Preserve District, Greg Kinczewski, individually and in his capacity as an attorney for the Cook County Forest Preserve District and Cook County Civil Service Commission, Defendants-Appellees.

No. 90-1481.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 5, 1990.

Decided Aug. 7, 1991.

Former probationary police officers brought employment discrimination suit following their discharge. The United States District Court for the Northern District of Illinois, Eastern Division, Suzanne B. Conlon, J., dismissed complaint, and officers appealed. The Court of Appeals, Grant, Senior District Judge, sitting by designation, held that allegations in original and amended complaint failed to state any claims upon which relief could be granted.

Affirmed.

1. Federal Civil Procedure ¶674

Even under liberal notice pleading, complaint must identify grounds upon which claims are based. Fed.Rules Civ. Proc.Rule 8(a), 28 U.S.C.A.

2. Federal Courts ¶713

General reference to "pleadings and affidavits" contained in plaintiffs' appendix, in place of statement of facts, improperly shifted plaintiffs' burden of pleading to the court. F.R.A.P.Rule 28(a)(3), 28 U.S.C.A.

3. Federal Civil Procedure ¶629

Newspaper articles, commentaries and editorial cartoons attached to complaint referring to sex-for-jobs scandal were not the type of documentary evidence or "written instrument[s]" which Federal Rules of Civil Procedure intended to be incorporated into, and made part of, the complaint. Fed. Rules Civ.Proc.Rule 10(c), 28 U.S.C.A.

4. Civil Rights ¶375

Probationary officer's complaint arising out of her discharge failed to state claim for sexual harassment; complaint alleged "unwelcome sexual advances, unwelcome requests for sexual favors and other unwelcome verbal and physical conduct of a sexual nature," but failed to identify any specific incidents of harassment, when these "unwelcome advances" occurred, or identify what the "terms, conditions and privileges" of her employment were or how they were affected. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ¶235(5)

Probationary police officers' complaint charging due process and equal protection violations, but failing to identify any property or liberty interest or any prior or subsequent history of disparate treatment failed to state claim under § 1983. 42 U.S.C.A. § 1983.

6. Conspiracy ¶18

Probationary officers failed to state § 1985 and 1986 claims arising out of their discharge, where officers failed to identify any protected property or liberty interest in employment or show meeting of minds be-

tween alleged conspirators. 42 U.S.C.A. §§ 1985, 1986.

7. Civil Rights ¶235(5)

Probationary officers stated no due process claim under Illinois law arising out of their discharge, absent citation to statutes, rule or regulation which would entitle them to hearing before county civil service commission in connection with discharge or to continued employment.

8. Civil Rights ¶375

Probationary officer's failure to allege compliance with administrative filing requirements of ADEA warranted dismissal of claim. Age Discrimination in Employment Act of 1967, § 7(d), 29 U.S.C.A. § 626(d).

9. Civil Rights ¶235(5)

Probationary officers alleged no facts showing that individual defendants acted pursuant to municipal policy or custom in discharging them or that such actions caused them to be deprived of constitutional right, as required to support claim against such defendants in their official capacities.

10. Civil Rights ¶362

Administrative filing requirements imposed under Title VII and ADEA are not jurisdictional prerequisites which pose absolute bar to suit, but rather conditions precedent, similar to statutes of limitation, which are subject to equitable modification. Civil Rights Act of 1964, §§ 701 et seq., 706(d), (e)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-5(e), (f)(1); Age Discrimination in Employment Act of 1967, § 7(d), 29 U.S.C.A. § 626(d).

11. Administrative Law and Procedure ¶456**Civil Rights** ¶362

Completion of Equal Employment Opportunity Commission (EEOC) intake questionnaire did not constitute charge for purposes of ADEA administrative filing requirement, where plaintiff was informed by EEOC at time he completed intake questionnaire that there was insufficient information to support his claim of retaliation and that no further action would be taken

on the basis of the questionnaire. Age Discrimination in Employment Act of 1967, § 7(d), 29 U.S.C.A. § 626(d). and was obviously deficient. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

12. Federal Civil Procedure ¶849

Generally, complaint may not be amended by briefs in opposition to motion to dismiss.

13. Administrative Law and Procedure ¶673

Civil Rights ¶364

Official not named in Equal Employment Opportunity Commission (EEOC) charge could not be sued under Title VII. Civil Rights Act of 1964, § 706(d), (e)(1), as amended, 42 U.S.C.A. § 2000e-5(e), (f)(1).

14. Civil Rights ¶367

Receipt of right-to-sue letter after complaint had been filed, but before it had been dismissed, effectively cured deficiency in original complaint.

15. Federal Civil Procedure ¶825

Plaintiff's right to amend as a matter of course survives motion to dismiss.

16. Federal Civil Procedure ¶825

Probationary officer effectively used up her right to amend as a matter of course following dismissal when she attempted to amend complaint to include right-to-sue letter, and any further amendment required leave of court, but even if she had retained right to amend as a matter of course, that right was not absolute. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

17. Federal Civil Procedure ¶851

Following dismissal of complaint, district court may deny leave to amend if proposed amendment fails to cure deficiencies in original pleading, or could not survive second motion to dismiss. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

18. Federal Civil Procedure ¶851

Following dismissal of probationary officer's original complaint, district court properly denied leave to file amended complaint which added nothing of substance

Peter J. O'Malley (argued), Chicago, Ill., for plaintiffs-appellants.

Alison E. O'Hara (argued), Office of Atty. Gen., Civ. Appeals Div., Lawrence J. Suffredin, R. Matthew Simon, Simon & Spitali, Chicago, Ill., for defendant-appellee Marshall Silverstein.

Lawrence J. Suffredin, R. Matthew Simon, Simon & Spitali, Chicago, Ill., for defendants-appellees George W. Dunne, Steve Castans, Chris Siragusa, John Gabhart, James Gaughan, Lewis Kortas, Edward Connelly, Bruce Quintos, G. Palacios, Sgt. Lawrence and Greg Kinczewski.

Iris E. Sholder, Office of State's Atty. of Cook County, Chicago, Ill., for defendant-appellee Cook County Civ. Service Com'n.

Before COFFEY and KANNE, Circuit Judges, and GRANT, Senior District Judge.*

GRANT, Senior District Judge.

Plaintiffs Marie Perkins and George Gaynor, former probationary police officers for the Cook County Forest Preserve District Police Department, filed a sixteen count employment discrimination suit against several members of the Department, defendants Castans, Siragusa, Kortas, Connelly, Quintos, Palacios and Lawrence, two members of the District's administration, defendants Gabhart and Gaughan, the President of the Forest Preserve District, George Dunne, the District's Chief Executive Officer, Marshall Silverstein, its attorney, Greg Kinczewski, and the Cook County Civil Service Commission alleging violations of Title VII, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986, and unidentified state law. The district court dismissed the complaint in its entirety under Fed.R.Civ.P. 12(b)(1) and (6),

sitting by designation.

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is

and denied Perkins' belated motion to amend. This appeal followed. For the following reasons, we now affirm the judgment of the district court.

I. PRIOR PROCEEDINGS

The Commission was named as a defendant in only two counts of the complaint, both alleging violations of procedural due process under state law. Plaintiffs alleged that they had a right under the Commission's Rules and Regulations to have the decisions to terminate their employment reviewed by the Commission, and that that right was violated. The Commission filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) contending that there was no provision for the type of administrative appeal which plaintiffs sought. The district court agreed, citing Ill.Rev.Stat. ch. 34, § 1114 and Civil Service Commission Rule IX, Sec. 12 which give the appointing officer or the executive officer in the department in which an officer is employed the authority to discharge a probationary employee, with the consent of the Commission, "upon assigning in writing to [the] Commission his reasons therefor," and granted the Commission's motion to dismiss.

Taking their cue from the Commission, the individual defendants moved to dismiss the remaining counts of the complaint. On July 24, 1989, the district court granted that motion and issued a detailed memorandum opinion citing various defects in the complaint. It dismissed plaintiffs' Title VII and ADEA claims for lack of jurisdiction under Fed.R.Civ.P. 12(b)(1), finding that plaintiffs had failed to allege compliance with the "jurisdictional prerequisites" of 42 U.S.C. § 2000e-5(e) and (f)(1) and 29 U.S.C. § 626(d). The §§ 1983 and 1985 claims were found to be insufficient because plaintiffs failed to identify a protected property or liberty interest in their employment, *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976), or to allege facts, which if true, would establish the existence of a conspiracy among the defendants. *Rodg-*

ers v. Lincoln Towing Service, Inc., 596 F.Supp. 13, 21 (N.D.Ill.1984), *aff'd*, 771 F.2d 194 (7th Cir.1985). Absent a viable claim under § 1985, the court concluded there could be no claim under § 1986. *Williams v. St. Joseph Hospital*, 629 F.2d 448, 452 (7th Cir.1980). Plaintiffs' pendent state due process claims were found to be equally lacking in that they failed to identify any basis for plaintiffs' assertion of a right to continued employment with the Department or to cite any statute, rule or regulation which would have entitled them to any process beyond that already received.

We concur with the district court with respect to all but the Title VII and ADEA claims, and find any error in the disposition of those claims to be harmless.

II. STANDARD OF REVIEW

In determining the propriety of dismissal under Fed.R.Civ.P. 12(b)(6), the district court is bound by the same standard which binds this court on appeal. It must accept as true all well-pled factual allegations in the complaint and draw all reasonable inferences therefrom in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Corcoran v. Chicago Park District*, 875 F.2d 609, 611 (7th Cir.1989); *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1032-33 (7th Cir.1987). If it appears beyond doubt that plaintiffs can prove any set of facts consistent with the allegations in the complaint which would entitle them to relief, dismissal is inappropriate. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Illinois Health Care Ass'n v. Illinois Dept. of Public Health*, 879 F.2d 286, 288 (7th Cir. 1989). They may not avoid dismissal, however, simply by attaching bare legal conclusions to narrated facts which fail to outline the bases of their claims. *Sutliff, Inc. v. Donovan Companies*, 727 F.2d 648, 654 (7th Cir.1984); *see also*, *Gomez*, 811 F.2d at 1033 (court not bound by plaintiffs' legal characterization of the facts); *Strauss v.*

City of Chicago, 760 F.2d 765, 767-68 (7th Cir.1985) (absence of any facts to support plaintiff's claim renders allegations mere legal conclusions subject to dismissal).

If the district court found it difficult to apply this standard in the present case, we sympathize. It was an onerous task. The complaint lacks material factual allegations, contains a tedious repetition of legal conclusions, and improperly joins the plaintiffs' claims in a single action.

III. ANALYSIS

A. Sufficiency of the Allegations

[1,2] To suggest that the factual allegations in plaintiffs' complaint were not "well-pled" is an understatement. While plaintiffs make clear in their original complaint what their claims are, they fail to identify the grounds upon which their claims are based.¹ This they must do, even under the liberal notice pleading of Rule 8(a). *Conley*, 355 U.S. at 47, 78 S.Ct. at 102. In place of particularized factual allegations, plaintiffs assault us with general statements of the law which were lifted verbatim from federal statutes, regulations and case law dealing with employment discrimination, i.e., "quid pro quo harassment," "hostile work environment," "unwelcome sexual advances," "age discrimination," "wrongful termination," "equal protection," "due process," and "conspiracy." See *Sutliff, Inc.*, 727 F.2d at 654 (complaint which merely recites statutory language and related legalese but fails to allege minimal material factual allegations outlining violation of the law insufficient).

Apparently reading Fed.R.Civ.P. 10(c) as a license to plead their case by exhibit, plaintiffs attached an assortment of letters,

newspaper articles, commentaries, cartoons and miscellaneous other exhibits to their complaint, leaving it to the court to extract the relevant facts. To the extent plaintiffs rely on this haphazard compilation to fill the void left in their complaint, their reliance is misplaced. The exhibits show that there were non-discriminatory reasons for terminating plaintiffs' employment; that plaintiffs were accorded a full-adversary pre-termination hearing; and that they were discharged on the basis of a hearing board's recommendation and, in Perkins' case, the decision of the President of the District, defendant George Dunne. It is difficult, if not impossible, to see how these facts, and those which follow, favor the plaintiffs' case.

1. Perkins

According to the exhibits, Perkins attempted suicide on March 24, 1988, and was consequently charged with a violation of Department Rule 15.20 which prohibits officers from engaging in any activities, on or off duty, "which indicate instability of character or personality," and "give the appearance of impropriety." The hearing originally scheduled for April 6, 1988 was continued at Perkins' request, or on her behalf, until June 23, 1988.

[3] In late April, 1988, the Chicago media featured defendant Dunne as the subject of a sex-for-jobs scandal.² Perkins' role in the scandal is unclear. While she apparently made a public disclosure of the fact that she and Dunne had, at some unidentified point in time, engaged in a sexual relationship, she later denied any connection between their relationship and her job with the Department.

were provided prove far more beneficial to the defendants than the plaintiffs.

1. The absence of any factual background is also evident in plaintiffs' appellate brief. In place of the statement of facts mandated by Fed.R. App.P. 28(a)(3), we find a general reference to the "pleadings and affidavits" contained in plaintiffs' appendix. We strongly disapprove of this tactic. See *Skagen v. Sears, Roebuck & Co.*, 910 F.2d 1498, 1500 n. 2 (7th Cir.1990). It improperly shifts the plaintiffs' burden of pleading to the courts, and imposes upon us the time-consuming job of reconstructing the facts. In the present case, the facts with which we

2. The newspaper articles, commentaries and editorial cartoons which Perkins attached to the complaint referencing this "scandal," are not the type of documentary evidence or "written instrument[s]" which Fed.R.Civ.P. 10(c) intended to be incorporated into, and made a part of, the complaint. See generally, Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1327, p. 763 and n. 7 (2d ed. 1990).

A Hearing Board comprised of defendants Siragusa, Gabhart and Gaughan convened on June 23, 1988 to hear the charges stemming from the attempted suicide. At the conclusion of the evidence, the Board unanimously agreed that Perkins' conduct indicated instability of character, gave the appearance of impropriety, and "threaten[ed] in the future the safety of herself, her fellow officers, and the public." The Board recommended termination, and Dunne, as President of the District, made the final discharge decision.

[4] On the basis of these "facts," Perkins concludes that she was the victim of "*quid pro quo* sexual harassment" and a "hostile work environment." She alleges that Silverstein and Dunne subjected her to "unwelcome sexual advances, unwelcome requests for sexual favors and other unwelcome verbal and physical conduct of a sexual nature," and that the defendants' conduct "substantially affected the terms, conditions, and privileges of [her] employment," but fails to identify any specific incidents of harassment, to tell us when these "unwelcome advances" occurred, or to identify what the "terms, conditions and privileges" of her employment were, or how they were affected.

[5-7] In her § 1983 claims, Perkins charges Silverstein and Dunne with violating the due process and equal protection clauses of the fourteenth amendment, but fails to identify any property or liberty interest in her employment or to allege any prior or subsequent history of disparate treatment. Her §§ 1985 and 1986 claims are premised on an alleged conspiracy to deprive her of rights and privileges accorded her under the fourteenth amendment and Title VII, but again fail to identify any protected property or liberty interest in her employment or to show a meeting of the minds between the alleged conspirators. We also note that to the extent these claims are premised on a violation of rights created by Title VII, they are in direct conflict with *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 378, 99 S.Ct. 2345, 2352, 60 L.Ed.2d 957 (1979). The pendent state due

process allegations are also insufficient. Perkins cites no statute, rule or regulation which would entitle her to a hearing before the Commission in connection with her discharge, or to continued employment with the Department.

2. Gaynor

In Gaynor's case, the exhibits show that he was the subject of at least five written reports between July 21, 1988 and August 20, 1988 in which his conduct or performance as a police officer was questioned by his superior officers, defendants Palacios, Lawrence and Quintos. The incident which ultimately led to Gaynor's termination occurred on August 28, 1988. While on duty with another officer, Gaynor engaged in a conversation in which he made several derogatory remarks about the Department and his superiors and stated that he would be willing to falsify information on a police report. Unknown to Gaynor, the radio in the squad car was "keyed up" and the conversation was broadcast over the airwaves, recorded at the station and was overheard by a supervisor, defendant Quintos. Gaynor was subsequently charged with violating Department Rule 14.9 which provides:

Any officer of the Department who shall in the performance of his/her official duties display reluctance to properly perform his/her assigned duties, or who act[s] in a manner tending to bring discredit upon himself or the Department, or who fails to assume responsibility or exercise diligence, intelligence, and interest in the pursuit of their duties, or whose actions or performance in a position, rank or assignment are below acceptable standards, may be deemed incompetent and *shall be subject to dismissal from the Department.*

(Emphasis added).

On September 16, 1988, a Formal Inquiry Board comprised of defendants Castans, Gabhart, and Connelly convened to hear the charges against Gaynor, and his defense thereto. The Board concluded on the basis of the evidence presented that Gaynor was guilty of violating Department

Rules 14.9, 18.12 and 18.14,³ and requested that he be terminated.

Gaynor alleges in his complaint that he was 56 years old "at the time of his employment"; that he was performing his duties as a police officer in a reasonably proficient manner;⁴ and, that defendants Silverstein, Castans, Gabhart, Gaughan, Quintos, Palacios, and Lawrence initiated disciplinary proceedings against him as "a pretext to the discriminatory motive of age discrimination." He alleges that his "wrongful termination" and replacement by a "non-civil service temporary appointee office" constituted a violation of the ADEA. Gaynor's due process allegations are virtually identical to Perkins'. He challenges his termination under § 1983 and unidentified state law, contending that he was deprived of a protected liberty and property interest in "completing his probationary period as a police officer and thereby obtaining full Civil Service status"; that he was "stigmatized and prevent[ed] from obtaining future employment"; and, that he was denied the opportunity to have the real reasons for his termination heard by the Commission. His claims under 42 U.S.C. §§ 1985 and 1986 are premised on an alleged conspiracy among the defendants to knowingly deprive him of "rights and privileges" protected under the ADEA and the fourteenth amendment, and their failure to prevent that deprivation.

[8] Gaynor's §§ 1983, 1985, 1986 and pendent state claims are, in almost all respects, identical to those we found insufficient in Perkins' case. Gaynor fails to identify a protected property or liberty interest in his employment, to show a meeting of the minds between the alleged coconspirators, or to cite any statute, rule or regulation which would entitle him to a hearing before the Commission in connection with his discharge, or to continued employment with the Department. The

3. Department Rule 18.12 is neglect of duty. Rule 18.14 is inattention to duty.

4. Gaynor alleges that "he met the reasonable proficiency standards for the performance of his duties as a police officer. . . ." The exhibits, which he attached to the complaint, show otherwise. In determining the sufficiency of the

substantive deficiencies in his ADEA allegations are too numerous to count. We need cite but one, Gaynor's failure to allege compliance with the administrative filing requirements of 29 U.S.C. § 626(d), to find that dismissal of the ADEA claim and any claim premised thereon was warranted.

3. "Official Capacity"

[9] To the extent plaintiffs seek damages against the defendants in their official capacities, their complaint is in effect an action against Cook County, a municipality. See *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3104-05, 87 L.Ed.2d 114 (1985); *Leahy v. Board of Trustees of Community College District No. 508*, 912 F.2d 917, 922 (7th Cir.1990). To support such a claim, the plaintiffs must allege facts, which if true, would show that the defendants acted pursuant to a municipal policy or custom when they discharged the plaintiffs, and that such actions caused them to be deprived of a right protected by the Constitution. *Graham*, 473 U.S. at 166, 105 S.Ct. at 3105; *Oklahoma City v. Tuttle*, 471 U.S. 808, 817-18, 105 S.Ct. 2427, 2432-33, 85 L.Ed.2d 791 (1985); *Monnell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). They have done neither.

B. The Title VII and ADEA Claims

[10] In dismissing plaintiffs' Title VII and ADEA claims, the district court erroneously concluded that 42 U.S.C. § 2000e-5(e), (f)(1) and 29 U.S.C. § 626(d) were "jurisdictional prerequisites." They are not. Since *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982) and *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1111 (7th Cir.1984), we have consistently held that the administra-

complaint we must rely on the exhibits whenever the allegations of the complaint are materially inconsistent with those exhibits. See *Foshee v. Daoust Construction Co.*, 185 F.2d 23, 25 (7th Cir.1950); Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1327, pp. 766-67.

tive filing requirements imposed under Title VII and the ADEA are not "jurisdictional prerequisites" which pose an absolute bar to suit, but rather "conditions precedent," similar to statutes of limitations, which are subject to equitable modification. *Stark v. Dynascan Corp.*, 902 F.2d 549, 551 (7th Cir.1990) (ADEA); *Schnellbaeher v. Baskin Clothing Co.*, 887 F.2d 124, 126 (7th Cir.1989) (Title VII); *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1317 (7th Cir.1989) (ADEA); *Anooya v. Hilton Hotel Corp.*, 733 F.2d 48, 49 (7th Cir.1984) (Title VII).

[11] In Gaynor's case, the distinction is immaterial. He neither alleges compliance with § 626(d),⁵ nor demonstrates an equitable basis for modifying the requirements set out therein. In an affidavit in response to the motion to dismiss, Gaynor attempts to argue that his completion of an EEOC intake questionnaire satisfies the requirements of § 626(d). The district court disagreed, as do we. In *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir.1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989), we held that an intake questionnaire may, under certain circumstances, constitute a charge for purposes of the ADEA administrative filing requirements, i.e., where the information contained in the questionnaire was sufficient to constitute a charge, and both the claimant and EEOC indicated that they would treat the questionnaire as a charge. *See also Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321, 324-25 (7th Cir.1991). Those circumstances are not present in this case. Gaynor acknowledges in his affidavit that he was informed by the EEOC at the time he completed the intake questionnaire that there was insufficient information to support his claim of

retaliation and that no further action would be taken on the basis of the questionnaire.

[12] The distinction, however, is far more significant in Perkins' case. 42 U.S.C. § 2000e-5(e) and (f)(1) provide in relevant part as follows:

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter....

(f)(1).... If a charge filed with the Commission ... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section ... [or] has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge [] by the person claiming to be aggrieved....

Perkins failed to allege compliance with either of these filing requirements in her original complaint. The omission was not inadvertent. Perkins did not have a right-to-sue letter when she filed her complaint, and had not named Dunne in the administrative charge which she filed with the EEOC. She attempted to cure both oversights in her response to the defendants' motion to dismiss.⁶ She had, by that time, procured a right-to-sue letter from the

5. 29 U.S.C. § 626(d) provides:

No civil action may be commenced by an individual under [the ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed....

6. As a general rule, a complaint may not be amended by briefs in opposition to a motion to dismiss *Thomason v. Nachtrieb*, 888 F.2d 1202,

1205 (7th Cir.1989); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985). In the present case, however, the district court appears to have deemed the exhibits attached to the plaintiffs' opposition brief to be a part of the complaint, and considered those exhibits in reviewing the sufficiency of the complaint.

EEOC which she attached to her response brief. With respect to defendant Dunne, she argued that Silverstein had been named in the EEOC charge and that notice to Silverstein constituted notice to Dunne since they were both administrators of the Forest Preserve District.

[13] To the extent Perkins alleges any violation of Title VII by Dunne, the district court correctly concluded that her claims are barred by 42 U.S.C. § 2000e-5(f)(1). Perkins does not dispute the fact that George Dunne was not named in the charge which she filed with the EEOC. Her public denial of any connection between her relationship with Dunne and her job with the Department suggests a reasonable explanation for that omission. Neither has she alleged any facts which warrant an exception to the general rule that a party not named in the EEOC charge cannot be sued under Title VII. See *Schnellbaeher*, 887 F.2d at 126-27; *Eggleson v. Chicago Journeymen Plumbers' Local Union No. 130, U.A.*, 657 F.2d 890, 905 (7th Cir.1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1710, 72 L.Ed.2d 134 (1982); *LeBeau v. Libbey-Owens-Ford Co.*, 484 F.2d 798, 799 (7th Cir.1973).

[14] The disposition of Perkins' Title VII claims against Silverstein is not quite so simple. While they may have been subject to dismissal at any time prior to Perkins' receipt of a right-to-sue letter, the receipt of that letter after the complaint had been filed, but before it had been dismissed, effectively cured the deficiency in the original complaint. *Williams v. Washington Metro. Area Transit Authority*, 721 F.2d 1412, 1418 n. 12 (D.C.Cir.1983); *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518, 1525 (11th Cir. 1983); *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1093 (4th Cir.1982); *Pinkard v. Pullman-Standard, a Division of Pullman, Inc.*, 678 F.2d 1211, 1218 (5th Cir.1982) (*per curiam*), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1095 n. 13 (5th Cir. 1981); *Henderson v. Eastern Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir.1972)

(*per curiam*), *cert. denied*, 410 U.S. 912, 93 S.Ct. 976, 35 L.Ed.2d 275 (1973). Had the Title VII allegations been sufficient in all other respects, reversal would have been warranted and Perkins would have been afforded the opportunity to amend her complaint to show compliance with the statute. They were not. As our previous discussion clearly indicates, Perkins' Title VII claims were subject to dismissal for reasons totally unrelated to jurisdiction.

C. The Motion to Amend

Although the district court clearly anticipated that the plaintiffs might attempt to amend their pleadings following dismissal, four months elapsed before Perkins filed her motion for leave to amend and supplement her portion of the complaint. The motion provided no explanation or excuse for the delay. The allegations of the proposed amended complaint mirror those of the first in several respects, expand the federal and state due process allegations to include specific citations to Illinois law and the Commission's Rules, and add a claim under the first amendment.

Citing the untimeliness of the amendment and its failure to cure deficiencies previously identified, the district court denied leave to amend. On appeal, Perkins contends that she had an absolute right to amend her complaint as a matter of course under Fed.R.Civ.P. 15(a), and that the district court erred in summarily denying her that right. We disagree.

[15-17] While a plaintiff's right to amend as a matter of course survives a motion to dismiss, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir.1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985), Perkins effectively used up that right when she made her first attempt to amend the complaint to include the right-to-sue letter. Any further amendment required leave of court under Fed.R.Civ.P. 15(a), the grant or denial of which was subject to the court's discretion. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77 (1971); *Amendola v. Bayer*, 907 F.2d 760, 764 (7th Cir.1990). Even if Perkins had retained a right to

amend as a matter of course, that right was not absolute. *Williams v. U.S. Postal Service*, 873 F.2d 1069, 1072 (7th Cir.1989); *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387, 1391 and n. 1 (7th Cir.1983), *Sarfaty v. Nowak*, 369 F.2d 256, 259 (7th Cir.1966), *cert. denied*, 387 U.S. 909, 87 S.Ct. 1691, 18 L.Ed.2d 627 (1967). Under either circumstance, a district court may deny leave to amend if the proposed amendment fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir.1985); *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1244 (7th Cir.1983); *Textor*, 711 F.2d at 1391 and n. 1; *Jafree v. Barber*, 689 F.2d 640, 644 (7th Cir.1982); *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir.1972). To hold otherwise would impose upon the defendants and the courts the arduous task of responding to an obviously futile gesture on the part of the plaintiffs. Rule 15(a) does not require the courts to undertake such an exercise. *Glick*, 766 F.2d at 268-69.

[18] While the amended complaint is significantly longer than the first, it adds nothing of any substance. Perkins repeats her Title VII allegations against Dunne, ignoring the fact that she failed to name him in the EEOC charge. See *Schnellbaeher*, 887 F.2d at 126-27 (as a general rule a party not named in the EEOC charge cannot be sued under Title VII). Her Title VII allegations against Silverstein remain vague and conclusory. Her attempts to bolster her due process arguments with actual citations to Illinois law and the Commission's Rules ignore the express language of Ill.Rev.Stat. ch. 34, § 1118 which gives the appointing officers or executive head of the Department the right to discharge a probationary employee without reference to the procedures provided for the removal, discharge or suspension of non-probationary classified service employees.⁷ Under Illinois law and the Commis-

sion's Rules, the appointing officer may discharge a probationary employee, with the consent of the Commission, upon signing in writing to the Commission the reasons therefor. Ill.Rev.Stat. ch. 34, § 1114 and Commission Rule IX, Sec. 12. Perkins' contention on appeal that the Commission was required to consent to the reasons for the discharge is directly contradicted by *Alberty v. Daniel*, 25 Ill.App.3d 291, 323 N.E.2d 110 (1974) (Commission required to consent only to the discharge, not as to the reason). Perkins expands her § 1983 claim to add allegations of a first amendment violation, but fails to supply us with anything more than conclusory legal allegations, or to explain why the court should allow her to assert an additional claim almost a year after the original complaint was filed. The allegations of a conspiracy in her §§ 1985 and 1986 claims are totally unsupported by any facts. See *Rodgers v. Lincoln Towing Service, Inc.*, 596 F.Supp. 13, 21 (N.D.Ill.1984), *aff'd*, 771 F.2d 194 (7th Cir.1985). As the district court correctly noted, there can be no cause of action under § 1986 absent a viable § 1985 claim. *Williams v. St. Joseph Hospital*, 629 F.2d 448, 452 (7th Cir.1980).

Granting leave to file an amended complaint which is so obviously deficient would indeed have been an exercise in futility, and could have potentially subjected plaintiffs and their counsel to Rule 11 sanctions. We will not require a district court to indulge in such futile gestures. *Glick*, 766 F.2d at 268-69.

IV. CONCLUSION

The allegations of the original and amended complaint fail to state any claims upon which relief could be granted. The judgment of the district court dismissing plaintiffs' cause of action is, accordingly, AFFIRMED



7. Section 1118 provides in pertinent part:

Any officer or employee serving his or her probationary period may be discharged by the appointing officers or the executive head

of the department, institution or office in which such officer or employee is then employed, without reference to the provisions of this section.

be said to have discharged men for engaging in a protected concerted activity when they had no knowledge that such an activity was occurring.³

[1] In many respects this case parallels that of *N. L. R. B. v. Draper Corporation*, 4 Cir., 145 F.2d 199 at page 205, 156 A.L.R. 989, where the court stated: "It should be noted that a 'wild cat' strike in violation of the purposes of the act and of an agreement existing between the employer and employees for orderly collective bargaining is clearly distinguishable from a strike which, although not justified, nevertheless accords with the rights of the parties under the National Labor Relations Act. * * * [M]inorities who engage in 'wild cat' strikes, in violation of rights established by the collective bargaining statute, can find nothing in that statute which protects them from discharge."

Even if the walkout in this case had been a strike, it was a strike in violation of the grievance and safety procedures⁴ laid down in the contract between the Union and the respondent and hence was not a protected activity. See *N. L. R. B. v. American Mfg. Co. of Texas*, 5 Cir., 203 F.2d 212, 216-217, and cases cited.

[2, 3] We recognize the power of the Board to draw "reasonable inferences" from the evidential facts found at the hearing, see *Radio Officers' Union v. N. L. R. B.*, 347 U.S. 17, 74 S.Ct. 323, but we hold that the inferences drawn by the Board in this case were not reasonable. We deny enforcement to the

Board's order because we "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456.

The Board's petition for enforcement of its order is ordered denied.



SHALL v. HENRY et al.

No. 10966.

United States Court of Appeals
Seventh Circuit.

March 5, 1954.

Action for accounting of plaintiff's share of the profits realized from boxing matches in which defendant boxer, managed by plaintiff and two other individual defendants, engaged, segregation of any moneys received by defendant boxing club corporation for defendant boxer's and his managers' benefit, and treble damages for alleged conspiracy of such defendants and other defendant boxing club corporations in violation of the Anti-Trust Acts. From a judgment of the District Court for the Northern Dis-

3. It is true that there is some evidence that management personnel of the respondent had some knowledge that a walkout might occur on June 4, but all of their testimony in this regard reveals that they contemplated a district-wide walkout such as is frequently resorted to by the Union as a method of showing its power, and not a local walkout by some of the men in its mine to protest the failure to correct the grievance.

4. The contract provides for a detailed grievance procedure, starting with a complaint by the employee or a member of the Union's grievance committee and the employee's immediate superior, through

Company channels up to the highest Company officer at the mine, and finally submission to an arbitration board consisting of a member appointed by the Company, one appointed by the Union, and one appointed by these two.

In addition, the contract calls for a Safety Committee composed of three employee and three company representatives. This committee is required to hold bi-weekly meetings and to make suggestions to the Company as to safety conditions. In the event that the suggestions of the committee are not carried out by the Company, the Union may have recourse to the grievance procedure.

trict of Illinois, Eastern Division, William J. Campbell, J., dismissing plaintiff's fourth amended and supplemental complaint for want of jurisdiction, plaintiff appealed. The Court of Appeals, Lindley, Circuit Judge, held that plaintiff being a resident of California and only one of defendants a resident of Illinois, the District Court was without jurisdiction to proceed against any of defendants.

Judgment affirmed.

1. Monopolies \S 12(6)

The Anti-Trust Laws Acts are inapplicable to athletic contests such as boxing matches. Sherman Anti-Trust Act, \S 1-8, 15 U.S.C.A. \S 1-7, 15 note; Clayton Act, \S 1 et seq., 15 U.S.C.A. \S 12 et seq.

2. Courts \S 359

Whether plaintiff in action brought in Federal District Court for Northern District of Illinois for accounting of plaintiff's share of profits from boxing matches in which defendant boxer, managed by plaintiff and two individual co-defendants, engaged, has right to have such court decree an equitable lien on and isolate moneys thereafter becoming due such boxer from defendant boxing club corporation because of his participation in boxing bouts promoted by it must be determined by laws of Illinois.

3. Principal and Agent \S 90(1)

In action against a professional boxer, managed by plaintiff and two other individual defendants, for accounting of plaintiff's share of profits from boxing matches in which such boxer engaged, federal district court, under Illinois law, could not decree an equitable lien on, isolate, and compel defendant boxing club corporations to hold, funds received by them for such boxer's benefit because of his participation in bouts promoted by them in order that court might later determine how much, if any, of such funds might be due plaintiff.

4. Courts \S 273

The federal district court for Northern District of Illinois was without ju-

risdiction to proceed against any of defendants in action based on diversity of citizenship by a California resident against four corporations, of which only one was resident of Illinois, and three individual defendants residing in other states, for accounting, though nonresident corporations were doing business in such district. 28 U.S.C.A. \S 1391.

5. Federal Civil Procedure \S 570

The practice as to waiver of right to be sued in proper federal district was changed by federal civil procedure rule so that defenses to merits may now be set up in same pleading including defenses of court's lack of jurisdiction of person and wrong venue without waiving such defenses, and special appearances to challenge such jurisdiction or venue are no longer necessary. Fed.Rules Civ. Proc. rule 12(b), 28 U.S.C.A.

6. Federal Civil Procedure \S 1822

Defendants' motions to dismiss federal district court action for want of jurisdiction because of lack of diversity of parties' citizenship after filing of plaintiff's fourth and final amended and supplemental complaint were timely, though defendants might have filed answer setting up question of jurisdiction, as well as defenses on merits, without waiving right to object to jurisdiction. 28 U.S.C.A. \S 1391; Fed.Rules Civ.Proc. rule 12(b), 28 U.S.C.A.

7. Federal Civil Procedure \S 829

Though right to amend pleadings must be construed liberally, district court did not abuse its discretion in denying plaintiff's application to amend complaint after permitting three amendments thereof, especially where disposition of case on points relied on by defendants could not have been avoided by further amendments of complaint.

Louis M. March, Chicago, Ill., for appellant.

Vincent D. McConnell, Charles H. Watson, Chicago, Ill., Peabody, Westbrook, Watson & Stephenson, Chicago, Ill., of counsel, for appellees.

Before DUFFY, LINDLEY and SWAIM, Circuit Judges.

LINDLEY, Circuit Judge.

Plaintiff appeals from an order dismissing his suit. His original complaint, filed January 30, 1952, averred that he, a licensed manager of professional athletes, had a contract with defendant Clarence Henry, a boxer, whereby he was to participate in Henry's management and receive a percentage of the resulting profits. He sought an accounting from defendants Henry, Stiefel and Palermo, the two latter being co-managers with plaintiff, asserting that they were attempting to deprive him of his share of the profits realized from the boxing matches in which Henry had been engaged from time to time and in which he might engage in the future. At that time Henry was about to participate in a contest under the auspices of the International Boxing Club, Inc., an Illinois corporation. The Club was joined as defendant, not because it was a party to the contract but because it was the responsible party sponsoring the match. Plaintiff sought to segregate such moneys as might come into the hands of the corporation for the benefit of Henry and his managers.

An application for a restraining order was made, at which counsel for the corporation appeared, insisting that the court had no jurisdiction. The court, being fully occupied with a busy calendar, referred the application to the master for settlement of issues and recommendations. On February 4, the corporate defendant filed a formal motion, entering a special appearance, questioning the jurisdiction of the court and, shortly later, the three individual defendants Henry, Stiefel and Palermo presented a similar motion. On February 21, plaintiff filed an amended complaint, enlarging substantially upon his original averments. Again all defendants entered special appearances and moved to dismiss for want of jurisdiction. On March 29, plaintiff filed a second amended and supplemental complaint, further

elaborating upon his original averments. The motions to dismiss for want of jurisdiction previously filed were allowed to stand to this amended complaint. On May 9, plaintiff filed his fourth complaint, calling it a "third amended and supplemental complaint", wherein he named as additional defendants International Boxing Club, Inc., a New York corporation, International Boxing Club of Michigan, Inc., a Michigan corporation, and International Boxing Club of Missouri, Inc., a Missouri corporation.

He included in this pleading a claim against all defendants for treble damages incurred, as he averred, as the result of an alleged conspiracy upon their part in violation of the Anti-Trust laws of the United States. Defendants again interposed motions to dismiss for want of jurisdiction, insisting that diversity of citizenship did not exist; that the amount in controversy did not exceed \$3000; that no valid cause of action was stated in the claim for damages under the Anti-Trust Act and that the court lacked jurisdiction of the suit because it appeared from the complaint that plaintiff resided in California and not in Illinois and that not all of the defendants resided in the Northern District of Illinois as required by 28 U.S.C. § 1391.

On July 14 plaintiff was permitted to file his fifth pleading, namely, an amended and supplemental complaint enlarging upon the charges for an accounting and upon those under the Anti-Trust Act. The motions to dismiss for want of jurisdiction previously interposed were permitted to stand to this fifth and final complaint.

Arguments upon the motions to dismiss were heard by the master on July 22. On October 24 he filed his report, finding that the question of jurisdiction of the action under 28 U.S.C. § 1391 had been timely raised and that the cause must fail because of that statutory provision. He recommended further that, in view of the fact that there was no averment that anything was due from the corporate defendants, under the law of Illinois, they were not subject to equi-

table garnishment; that the claim for accounting must, therefore, fail as to them, and that no sufficient cause of action under the Anti-Trust Acts was presented against any of the defendants.

The court approved the report of the master and dismissed the complaint. The court also refused at that time to permit plaintiff's motion to file a sixth pleading, *i. e.*, one amending the last one filed. Upon appeal plaintiff insists that the court erred in each of the respects mentioned.

[1] All defendants were charged in the second portion of the final complaint with having violated the Anti-Trust Acts. We are of the opinion that the District Court rightly held that this claim failed to state a cause of action under the statute. That the business of professional baseball is not within the Anti-Trust Act, was established in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898.

The Supreme Court, on November 9, 1953 adhered to this doctrine in *Toolson v. New York Yankees, Inc.*, and two other cases disposed of at the same time, 346 U.S. 356, where the court declared, at 357, 74 S.Ct. 78, at 79, that Congress "had no intention of including the business of baseball within the scope of the federal antitrust laws." Those decisions must control unless there is some significant legal distinction between the business of promoting and producing boxing bouts at various places in the United States and that of professional baseball. A District Court has recently held that boxing is not to be distinguished from that of a professional baseball game, in *U. S. v. International Boxing Club, Inc.* (D.C.S.D.N.Y., Feb. 8, 1954, Noonan, J.) The same court, in *U. S. v. Schubert* (Dec. 30, 1953, Knox, J.) held that there is no legal difference between theatrical production and professional baseball.

We agree that a professional boxing contest is not to be distinguished legally from that of a professional baseball game. Obviously each involves a contest of physical skill and endurance tak-

ing place in a particular locality. The success of each depends upon the support of the public in the purchase of tickets and the sale of radio and television rights. Each baseball game is unique; no two are exactly alike. Each boxing contest is unlike any other. The profitable promotion of each depends upon the same elements. Under the mandate of the Supreme Court, therefore, we must hold that it was not the intention of Congress to extend the provisions of the Anti-Trust laws to athletic contests such as those involved in boxing. Consequently the District Court properly dismissed the complaint in so far as it involved a suit for treble damages under the Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note, and the Clayton Act, 15 U.S.C.A. § 12 et seq.

[2] The corporate defendants were included as defendants in the accounting charge solely because they were said to be promoting boxing exhibitions and, in doing so, were collecting money which would eventually be due in part to the participants, a percentage of which in turn would accrue to plaintiff. The theory seems to be that plaintiff had a right to have the court decree an equitable lien upon and isolate moneys thereafter becoming due defendant Henry from the corporation as a result of his participation in bouts. Whether such a contention is correct must be determined by the laws of Illinois. As the master has pointed out, this question has been decisively determined in *Lewis v. West Side Trust & Savings Bank*, 288 Ill.App. 271, 6 N.E.2d 481. There plaintiff sought to tie up moneys which he claimed might become due him, though held by third persons, by establishing an equitable lien on or garnishment of the funds in the hands of third persons held for the benefit of others. The court framed the question thus 288 Ill.App. at page 277, 6 N.E.2d at page 484: "We gather from the argument of complainants that the purpose of this order is to retain the property of its stockholders in the possession of the bank or the receiver so that should a judgment be entered in this

suit against a stockholder for his constitutional liability, complainants could satisfy the judgment out of the property so retained by the receiver. In other words, such procedure and remedy as would be equivalent to an attachment at law." After discussing the Illinois authorities, the court continued: "There is no such thing as equitable attachment in this state and the theory of taking away the control of a person's property by means of an injunction for the purpose of anticipating a judgment which may or may not thereafter be obtained by a litigant is abhorrent to the principles of equitable jurisdiction. As Mr. Justice Caton said in his opinion in the Phelps case, which we have just quoted: '* * * I am not aware of any principle of equity jurisprudence which will justify the issuing an injunction in such a case, to compel the parties to hold the goods pending a trial at law, to see if they will not be wanted to answer an execution upon a judgment which the complainant hopes to obtain.'" 288 Ill.App. at pages 278-279, 6 N.E.2d at page 484.

[3] The Illinois statutes provide for attachment suits, but plaintiff has made no attempt to comply with those acts. They provide also for garnishment of funds, after a judgment has been entered but remains unsatisfied, in the hands of third persons, but plaintiff has not brought himself within those provisions. Therefore, under the averments of the complaint, in view of the Illinois decisions, none of the corporate defendants could be compelled to hold such funds as might come into their hands for the benefit of Henry in order that the court might later determine how much thereof, if anything, might be due plaintiff. Consequently the court properly dismissed the accounting suit as to the corporate defendants.

[4] There remains for disposition, therefore, only the accounting charge against the three individual defendants. However, we find it unnecessary to determine whether a valid claim for an accounting has been presented, for the reason that, in our opinion, the court was

without jurisdiction to proceed. The suit was based upon diversity of citizenship. 28 U.S.C. § 1391 provides that a civil action founded only on diversity of citizenship may be brought only in the judicial district where all plaintiffs or all defendants reside. The record discloses that plaintiff was a resident of California and that of the defendants only one was a resident of Illinois. Defendants Henry, Stiefel and Palermo all resided in other states. Consequently, if the point was properly and timely raised, the court was without jurisdiction to proceed against any of the defendants. *Seaboard Rice Milling Co. v. Chicago, R. I. & P. Ry. Co.*, 270 U.S. 363, 46 S.Ct. 247, 70 L.Ed. 633.

We have observed that, from the beginning, each of the defendants has insisted that the court was without jurisdiction. They might have filed answers and in them preserved the question of jurisdiction. Rule 12 of Civil Rules of Procedure, 28 U.S.C.A. However, no answers were filed but motions to dismiss for want of jurisdiction and for failure to state a cause of action were interposed to each of the many pleadings submitted by plaintiff. Where neither defendants nor plaintiff reside within the district, the court has no jurisdiction. Such is the intent of the statute and it must control. *Blank v. Bitker*, 7 Cir., 135 F.2d 962; *Martin v. Lain Oil & Gas Co.*, D.C.E.D.Ill., 36 F.Supp. 252. Consequently the court properly dismissed the entire suit. Admitting *arguendo* that the nonresident corporations were doing business in the Northern District of Illinois, the fact still remains that none of the other defendants was a resident of that district. This fatality of jurisdiction is decisive.

[5, 6] We think the trial court properly found that no waiver of the rights to be sued in the proper district had occurred. There is not the slightest bit of evidence in the record to show that defendants waived their right to object to the jurisdiction of the court. As we said in *Blank v. Bitker*, 7 Cir., 135 F.2d 962, at page 966: "Under the Federal

Rules of Civil Procedure, which were in effect when this action was instituted, the prior practice as to waiver was changed so that defenses to the merits may now be set up in the same pleading which includes defenses of lack of jurisdiction of the person and wrong venue, without waiving the latter defenses. Rule 12(b) so provides, in stating that 'no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading * * *.' And authorities supporting and applying Rule 12(b) are growing in number. Accordingly, special appearances to challenge jurisdiction over the person or improper venue are no longer necessary." See also *Martin v. Lain Oil & Gas Co.*, D.C., 36 F.Supp. 252, at pages 254-255. Here, when the fifth and last pleading was presented, defendants might have filed an answer, setting up the question as to jurisdiction under Section 1391, while answering on the merits, without a waiver of the right to object because plaintiff had not brought himself within Section 1391. Rule 12(b). Instead of answering, it presented its motion to dismiss. We agree with the master that this was timely pleading.

[7] In view of the many amendments to the complaint permitted by the court and the voluminous pleadings filed as a result, even though the right to amend is to be construed liberally, we think the court did not abuse its discretion in denying at the time of judgment application to amend still further. There must be an end sometime to applications to amend. Plaintiff had five chances to state his case. Under the circumstances disclosed by the record, there was no abuse of discretion in this respect. This conclusion is fortified by the fact that the disposition of this case upon the points upon which we have relied could not have been avoided by further amendments. The fatal questions of jurisdiction and venue could not have been avoided by any amendment. The fact that no proper action under the Anti-Trust Act exists could not have been obviated. Con-

sequently, whether the amendment was allowed or not, this court would have been impelled to reach the conclusion it has reached on the deficiencies referred to in this opinion.

In view of our conclusions we do not reach the further questions submitted by the parties. The judgment is

Affirmed.



In re PUBLIC SERVICE CORP. OF
NEW JERSEY.

DRINKER BIDDLE & REATH

v.

SECURITIES AND EXCHANGE
COMMISSION.

UNITED CORP.

v.

SECURITIES AND EXCHANGE
COMMISSION.

Nos. 11120, 11130.

United States Court of Appeals

Third Circuit.

Argued Jan. 18, 1954.

Decided Feb. 24, 1954.

Proceeding on petitions to review supplemental order of Securities and Exchange Commission reducing attorneys' fee for services in connection with dissolution of public utility corporation and disallowing compensation for expenses incurred by parent holding company. The Court of Appeals, McLaughlin, Circuit Judge, held that evidence established that commission acted unreasonably in reducing attorneys' fee agreed to by attorneys and dissolved corporation, but that refusal of compensation to parent holding company was not unreasonable.

Order affirmed in part and reversed and remanded in part.