No. 20-869

# In The
# Supreme Court of the United States

DAVID E. HENRY,

Petitioner

v.

CASTLE MEDICAL CENTER,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

## REPLY BRIEF FOR PETITIONER

Respondent Castle Medical Center devotes most of its Brief in Opposition to arguing that the District Court properly denied Petitioner David E. Henry's post-judgment motion to amend his Complaint. In doing so, Castle tacitly admits that Petitioner's motion filed with a motion for relief from the judgment under Rule 59, should have been reviewed and decided under the standards generally applicable to such motions under Rule 15 in accordance with Foman v. Davis, 371 U.S. 178 (1962). Castle's failure to focus on the pertinent issue – whether a writ of certiorari should be granted – is telling, but understandable. Castle cannot present a meaningful argument that there is no split of authority among the circuits over the standards regarding a post-judgment motion for leave to amend or that this lack of uniformity is not an important, recurrent issue.

Castle attempts to distinguish this case from Foman on the ground that Foman involved dismissal for failure to state a claim under Rule12 while this case involved summary judgment under Rule 56. That is a distinction without a difference. Here, summary judgment was granted because the District Court determined that Petitioner was not an employee of Castle and therefore could not pursue claims for discrimination and retaliation under Title VII. The court never addressed the merits of Petitioner's complaint. Petitioner sought to amend his complaint to pursue claims for discrimination and retaliation under 42 U.S.C. § 1981, which does not require an employment relationship, based upon

the same factual background. Effectively, Petitioner sought to include a reference to 42 U.S.C. § 1981 in his complaint, which would remedy the issue that triggered summary judgment. Such an amendment would serve the same purpose as an amendment intended to supply an element of a cause of action missing in the original complaint, which is typical after dismissal for failure to state a claim under Rule 12.

The situation here is indistinguishable from Foman, where a complaint asserting breach of an oral agreement was dismissed under the statute of frauds but this Court held that the plaintiff was entitled to amend the complaint post-judgment to assert a claim for quantum meruit arising from the same facts. See id., 371 U.S. at 181-82.

In Johnson v. City of Shelby, 574 U.S. 10 (2014), this Court held that to survive a motion for summary judgment, a plaintiff needs not expressly invoke a statute where he had sufficiently alleged facts upon which relief might be granted under such statute. The plaintiffs in Johnson filed a complaint against a municipality for constitutional due process rights violations by their former employer under the Fourteenth Amendment. Summary judgment was entered against them by the District Court and affirmed by the Fifth Circuit because the complaint did not invoke 42 U.S.C. § 1983. This Court summarily reversed, explaining that the federal pleading requirements in Bell Atlantic Corp. v. Twombly, 550 U. S. 544 (2007), and Ashcroft v. Iqbal, 556 U. S. 662 (2009), concerned the factual allegations a complaint must contain to survive a

motion to dismiss. Having informed the city of the factual basis for their complaint, "the plaintiffs were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." Johnson, 547 U.S. at 12. Likewise, Petitioner's failure to invoke 42 U.S.C. § 1981 in his complaint should not be fatal to his claims of discrimination and retaliation against Castle. Petitioner should be afforded an opportunity to add to his complaint a claim under 42 U.S.C. § 1981. Cf., Johnson, 547 U.S. at 12 (holding that petitioners, on remand, should have an opportunity to add to their complaint a citation to §1983) (citing Rule 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires.")).

## I. There Is an Undeniable Split among the Circuits over the Standards Applicable to a Post-Judgment Motion to Amend a Complaint

Castle argues that there is no conflict between the circuits with respect to the standard of review of a post-judgment motion to amend a complaint. Opposition at 10-20. Castle's arguments are entirely misplaced and pure obfuscation. Castle posits that all twelve circuits "require that a party seeking to file an amended complaint post-judgment must first have the judgment set aside or vacated under Rule 59(e) or 60(b)." Id. at 11. That may be true in the sense that, if a complaint is to be amended after a judgment has been entered, the judgment must be set aside or vacated and the case re-opened, and the proper vehicle to do so is a motion under Rules 59(e) or 60(b). That is the procedure followed in Foman and its progeny. The disagreement among the

circuits concerns the questions of whether a post-judgment motion to amend should be considered by a court before the judgment is vacated on some other grounds and whether the standards generally applicable to such motions under Rule 15 should apply post-judgment. Equivalently, the question is whether the need to amend a complaint post-judgment may be the sole reason to reopen the judgment.

The cases string-cited by Castle in support of its position confirm the existence of a sharp split among the circuits, as well as lack of uniformity within the circuits. Thus, in United States ex rel. Ge v. Takeda Pharm. Co., 737 F.3d 116 (1st Cir. 2013), the First Circuit mentioned that a post-judgment motion to amend cannot be considered, but also cited Foman and indicated that under its standards failure to cure deficiencies in two amendments over almost three years of litigation justified the denial of another motion to amend.

In Janese v. Fay, 692 F.3d 221 (2d Cir. 2012), the Second Circuit stated that "amendment of a complaint becomes significantly more difficult" after judgment has been entered, and affirmed the denial of a motion to amend, but noted that because the dismissal of several counts was reversed, the judgment would not bar future motions to amend on remand. Id. at 229 (citing Nat'l Petrochemical Co. v. The M/T Stolt Sheaf, 930 F.2d 240 (2d Cir. 1991) (holding that "unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint" but "it might be appropriate in a proper

case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment") (citing Foman))).

In Jang v. Bos. Sci. Scimed, Inc., 729 F.3d 357 (3d Cir. 2013), the Third Circuit held that where a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and 59 inquiries turn on the same factors, which are the Foman factors.

In Calvary Christian Ctr. v. City of Fredericksburg, 710 F.3d 536 (4th Cir. 2013), the Fourth Circuit held that a post-judgment motion to amend accompanied by a motion to vacate the judgment "rise and fall together" under the Rule 15 standards.

In Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003), the Fifth Circuit discussed the need to have the judgment vacated when the plaintiff seeks to file an amended complaint post-judgment, but it ultimately followed Foman in holding that the disposition of a post-judgment motion to vacate is governed by the same considerations controlling the court's exercise of discretion under Rule 15.

In Leisure Caviar, LLC v. United States Fish & Wildlife Serv., 616 F.3d 612 (6th Cir. 2010), the Sixth Circuit cited Foman for the proposition that when a party seeks to amend a complaint after an adverse judgment, "the Rule 15 and Rule 59 inquiries turn on the same factors," but it also stated that the movant "must shoulder a heavier burden" instead of meeting the "modest requirements of Rule 15," and that the court ought to pay particular attention to "the

movant's explanation for failing to seek leave to amend prior to entry of judgment."

In Vesely v. Armslist Ltd. Liab. Co., 762 F.3d 661 (7th Cir. 2014), the Seventh Circuit ruled that a post-judgment motion to amend a complaint was "premature" when the court had not set aside the judgment, even when a timely motion under Rule 59(e) had been filed. Vesely conflicts directly with Runnion v. Girl Scouts of Greater Chi. & Nw. Ind., 786 F.3d 510 (7th Cir. 2015), and reflects the fractured jurisprudence within the Seventh Circuit in this area.

In United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737 (8th Cir. 2014), the Eighth Circuit acknowledged the split of authority within the circuit with some opinions holding that an unexcused delay in seeking leave to amend a complaint beyond the entry of a judgment of dismissal was sufficient to justify denial of leave to amend and other opinions holding that a plaintiff's non-prejudicial delay in seeking leave to amend post-judgment was not sufficient to deny the leave when amendment was needed to afford the plaintiff an opportunity to test his claim on the merits, citing Foman, also noting that the proposed amended complaint did not cure the deficiencies of the initial complaint and that there was an opportunity to test the merits of plaintiff's claims in a pending parallel action.

In Benson v. JPMorgan Chase Bank, N.A., 673 F.3d 1207 (9th Cir. 2012), the Ninth Circuit followed Lindauer v. Rogers, 91 F.3d 1355 (9th Cir. 1996), holding that a motion to amend a complaint may not

be considered after the entry of a judgment until the judgment is set aside.

In Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084 (10th Cir. 2005), the Tenth Circuit held that a court cannot consider a motion to amend a complaint unless the judgment is first vacated.

In Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327 (11th Cir. 2010), the Eleventh Circuit held that Rule 15 had no application after a judgment is entered and post-judgment a plaintiff may seek leave to amend only after he is granted relief under Rules 59(e) or 60(b).

In Bldg. Indus. Ass'n v. Norton, 247 F.3d 1241 (D.C. Cir. 2001), there was no post-judgment motion to amend at issue, but the District of Columbia Circuit referenced its opinion in Firestone v. Firestone, 76 F.3d 1205 (D.C. Cir. 1996), in which it held that Rule 15's liberal standard governs once the court vacated a judgment, but to vacate the judgment the plaintiff must first satisfy Rule 59's more stringent standard.

Therefore, the case law cited by Castle reflects that the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits acknowledge Foman and follow its approach to a post-judgment motion to amend at least to some degree, while the Ninth, Tenth, Eleventh and District of Columbia Circuits steadfastly refuse to consider such a motion unless and until the judgment is set aside, ignoring Foman.

The Seventh Circuit in the Runnion case fully embraced Foman and its standards, but there is a line of decisions in the Seventh Circuit, primarily

authored by Judge Michael S. Kanne, which effectively hold that a post-judgment motion to amend cannot succeed if the judgment is not vacated for other reasons pursuant to Rules 59 or 60. See Vesely, 762 F3d at 666-67; Helm v. Resolution Tr. Corp., 84 F.3d 874 (7th Cir. 1996); Figgie Int'l, Inc. v. Miller, 966 F.2d 1178, 1179 (7th Cir. 1992); Amendola v. Bayer, 907 F.2d 760, 765 (7th Cir. 1990). That line of decisions has its roots in the earlier decisions of the Seventh Circuit in Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1110-12 (7th Cir. 1984) and Twohy v. First Nat'l Bank, 758 F.2d 1185, 1196 (7th Cir. 1985), which in turn ultimately relied upon commentators Moore's Federal Practice and Wright & Miller, Federal Practice and Procedure, but without reference to Foman.

This Court should grant the present Petition in order to resolve the foregoing split among the circuit courts, which would also help to achieve uniformity within the circuits.

## II. Whether All Federal Circuit and District Courts Should Apply the Same Standard to a Post-Judgment Motion to Amend a Complaint Is an Important, Recurring Question

Castle posits that all circuits recognize that interests of finality of judgments affect a post-judgment motion to amend. Opposition at 16-18. This is another uncontroversial proposition often recited to justify denial of a motion to amend without consideration of its merits. However, the requirement that a timely motion under Rules 59(e) or 60(b) accompany a post-judgment motion to

amend ensures that the option to seek a post-judgment amendment is available for only 28 days after judgment under Rule 59(e) or within the time limits provided by Rule 60(b) in exceptional cases. Furthermore, the Foman factors of undue delay, prejudice, bad faith or dilatory motive, repeated failure to cure deficiencies, and futility, ensure that judgments that should be final will not be reopened to allow an amended pleading. The real issue is to strike a proper balance between the policy favoring determination of controversies on their merits and the policy favoring finality of judgments. The cases cited by Castle allowed post-judgment amendments following Foman and, contrary to Castle's argument, are totally incompatible with the Ninth Circuit's blunt refusal to even consider a post-judgment motion to amend. Compare Williams v. Citigroup Inc., 659 F.3d 208, 212-14 (2d Cir. 2011); Laber v. Harvey, 438 F.3d 404, 426-30 (4th Cir. 2006); and Morse v. McWhorter, 290 F.3d 795, 799-801 (6th Cir. 2002) with Lindauer, 91 F.3d at 1357.

Castle incudes another string-cite of opinions from several circuits to supposedly show that they "give due consideration to the principle of finality of judgments." Opposition at 18-19. These are mostly the cases already cited by Castle in its Opposition, and discussed above or in the Petition. They show that there is a sharp split among the circuits with respect to the question presented for review in this Petition.

The issue is sufficiently important to warrant this Court's attention. In Krupski v. Costa Crociere S. p. A., 560 U.S. 538 (2010), this Court has granted a

petition for writ of certiorari to review one aspect of Rule 15, namely, its relation back under section 15(c). Petitioner submits that the issue raised in this Petition, namely, applicability of Rule 15(a) post-judgment, is at least as important and as frequently occurring issue.

## III. The Decision Below Is Wrong

Castle argues that the reasons justifying the District Court's denial of Petitioner's motion to amend were "apparent" in the record. Opposition at 20-24. Castle imputes to Petitioner undue delay, bad faith, dilatory motive, and "gamesmanship." Id. This Court need not decide such issues. The questions for this Court to decide are whether the District Court should have considered the motion at all, and if so, whether the standards articulated in Foman should apply. However, if this Court finds it appropriate to address the factual issues raised by Castle, we offer the following clarifications.

Castle questions whether Petitioner was "pro se" until the eve of the hearing of Castle's motion for summary judgment. However, the record is clear that Petitioner's counsel first appeared on 11/29/2018. Petitioner filed a declaration describing the limited assistance he received from a Montana attorney and efforts to retain Hawaii counsel. ER at 110-13. The District Court accepted that Petitioner was "pro se" up to the summary judgment hearing. Petition at 19a-23a. Therefore, Castle's argument that Petitioner should not be considered a "pro se" litigant is baseless.

At the hearing on 11/30/2018, Petitioner's new Hawaii counsel said that they were not asking to amend the pleadings but merely were asking for a continuance so that the Montana counsel could appear to argue the summary judgment motion. However, they did not waive any future opportunity to amend the complaint, especially when the Montana counsel failed to appear. Having been retained two days earlier, counsel was in no position to assess any future need for amendments to the pleadings.

On 12/21/2018, Petitioner filed a complaint in an action styled Henry v. The Queen's Medical Center, et al., 1:18-cv-00500, which was intended to supersede, and eventually subsume through consolidation, the present action. The newly filed complaint included all claims Petitioner intended to pursue in the District Court except for the claims of discrimination and retaliation by Castle under Title VII, which were already asserted in this action.

In hindsight, it is easy for Castle to argue that the need to seek an amendment "must have become obvious" by 12/14/2018, and impute to Petitioner and his counsel intentionally delaying a motion to amend until after the District Court entered its order granting summary judgment on 1/28/2019. However, the reality is that Petitioner and his counsel did not become aware of the need to amend the complaint in this action until after the District Court granted summary judgment in favor of Castle when it appeared that Castle would be using the judgment in this action, limited to Title VII claims, to obtain dismissal of all other claims of the Petitioner against

Castle on res judicata grounds. Therefore, there were no "wait-and-see tactics" by Petitioner in not having moved for leave to amend the complaint before 1/28/2019. The proposed amendment to add a claim under 42 U.S.C. § 1981 is not futile and Castle would not be prejudiced because it did not litigate the merits of Petitioner's claims of discrimination and retaliation. It merely focused on the side issue of whether Petitioner was Castle's employee, which is not dispositive of the discrimination and retaliation claims.

No reasonable court would conclude that the passage of approximately eight weeks during which Petitioner's newly retained counsel were assessing this case constituted an "undue delay." Nor did the District Court so state. There were no prior amendments or requests to amend the complaint during approximately one year after it was filed. The only reason given for the denial of amendment was the Lindauer decision barring the court from considering a motion to amend post-judgment. That decision is wrong and leads to the unfair and unreasonable result in this and many other cases.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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