

No. 08-8682

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTIAN F. MEISTER
Petitioner,

v.

LEE COUNTY SHERIFF'S OFFICE, MIKE SCOTT, in his individual capacity and as Sheriff of the Lee County (FL) Sheriff's Office, DON HUNTER in his official capacity as Sheriff of Collier County (FL), J.J. CARROLL, RICHARD SNYDER, RYAN JUSTHAM, STEPHAN PIERCE, GENE SIMS, PEDRO SOTO, MIKE JOHNSTON, each of the foregoing, jointly and severally,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under Cohen v. Beneficial Industrial Loan Corps., 37 U.S. 541 (1949), an interlocutory appeal may be taken from the denial of a request for appointment of counsel under 28 U.S.C. §1915(e)(1) or 42 U.S.C. §2000e-5(f)(1).

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OPINION BELOW

The unreported decisions of the Eleventh Circuit order and the United States District Court for the Middle District of Florida. (Appendix A and Appendix B).

JURISDICTION

The Eleventh Circuit's decision was entered on September 25, 2008 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

A. Introduction

The Petitioner has filed this interlocutory appeal of the denial of his motion for appointment of counsel pursuant 28 U.S.C. §1915(e)(1) or 42 U.S.C. §2000e-5(f)(1). The Respondents assert that the denial of a motion for appointment of counsel is not the proper subject of an interlocutory appeal based on Cohen v. Beneficial Industrial Loan Corps., 337 U.S. 541 (1949).

B. Procedural Background

The Petitioner, a male of Austrian national origin, brought suit against the Respondents in the district court pursuant to 42 U.S.C. § 1983 seeking redress for various alleged constitutional violations including national origin and gender discrimination arising out of his attendance at the Southwest Florida Public Service Academy in 2005. Additionally, Plaintiff asserted a number of tort claims under Florida law including libel, slander, fraud and wrongful interference with employment relationship as well as claims for breach of contract and for violation of 29 U.S.C. 1132 ("ERISA"). Plaintiff's federal and state law claims are all premised upon alleged disparate treatment by his instructors and fellow recruits at the Academy as well as his contention that he was unjustly given unfavorable performance evaluations by those instructors.

On May 30, 2008 the Petitioner filed, along with other motions, his "Motion to Appoint an Attorney" in the District Court. This motion was denied on June 6, 2008 by United States Magistrate Judge Sheri Polster Chappell. Petitioner filed his Motion for review of the Magistrate's Order on June 20, 2008. This motion was denied on July 25, 2008 by United States District Judge Marcia Morales Howard (App. B). On August 4, 2008, Petitioner filed his notice

of appeal. On September 25, 2008, the Eleventh Circuit Court of Appeals dismissed, *sua sponte*, for lack of jurisdiction based on 28 U.S.C. §1291, Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983) and Broussard v. Lippman, 643 F.2d 1131, 1133 (5th Cir. 1981) (App. A). On February 7, 2009, Petitioner filed the instant Petition for Writ of Certiorari.¹

¹ On April 20, 2009 the District Court for the Middle District of Florida granted summary judgment for all Defendants below. The Judgment was entered on April 23, 2009. Since then, the Petitioner filed Motions to Recuse Judge Presnell, Vacate the Summary Judgment, Vacate the Order rendering moot Defendants' Motions to Dismiss, Vacate the Final Judgment and a Motion for Leave to file a Sixth Amended Complaint. These motions were denied on May 27, 2009.

ARGUMENT

28 U.S.C. §1291 provides for appellate review of "final decisions" made by district courts. Generally, a decision is final, and thus appealable, when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229 (1945). The Eleventh Circuit requires a party to raise all claims of error in a single appeal following final judgment on the merits. See Holt v. Ford, 862 F.2d 850, 851 (11th Cir. 1989).

Requiring an appeal to be raised only after litigation on the merits ends with nothing left for the court to do but execute the judgment serves several important court functions. It recognizes the deference appellate courts should show district courts in allowing them to decide a case on its merits. See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction of just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of final judgment." Cobbledick v. United States, 309 U.S. 323 (1940)). Requiring finality before an appeal is granted "prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

However, in Cohen v. Beneficial Indus. Loan Corp. 337 U.S. 541 (1949), this Court recognized an exception to the final judgment rule for a "small class of decisions that 'finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" id. at 546.

This Court subsequently articulated a three prong test to determine whether an appeal fits within the Cohen exception to the finality requirement and is appealable under §1291. To qualify for immediate review, a non-final order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

Since an order denying a motion for appointed counsel does not terminate the underlying litigation, it is only appealable under §1291 if it fits within the Cohen exception to finality. See Miller v. Simmons, 814 F.2d 962, 965 (4th Cir.), *cert. denied*, 484 U.S. 903 (1987).

The question here is whether an interlocutory appeal may be taken immediately forwarding denial of appointment of counsel under 28 U.S.C. §1915 (e)(1) or 42 U.S.C. §2000e-5(f)(1). Thus, the question then becomes, whether a denial fits the Cohen test, allowing it to be immediately appealable under section 1291.

The provisions of 28 U.S.C. §1915 (e)(1) and 42 U.S.C. §2000e-5(f)(1) are very similar with respect to the discretion given to district courts in deciding whether to appoint or refuse appointment of counsel. See Holt v. Ford, 862 F.2d 1523, 1523 (11th Cir. 1989). Under 28 U.S.C. §1915(d) a federal court "may request an attorney to represent any person unable to

afford counsel, while under 42 U.S.C. §2000e-5(f)(1) a court "may appoint" an attorney to represent the litigant. The language in the two statutes is very similar, thus some courts have held that "the question of appealability is the same whether counsel is sought under Title VII (i.e. 42 U.S.C. §2000e-5(f)(1) or 28 U.S.C. §1915(d)). See e.g., Henry v. City of Detroit Manpower Dept., 763 F.2d 757, 763 (6th Cir.) (*en banc*), 474 U.S. 1036 (1985); Robbins v. Maggio, 750 F.2d 405, 410 n. 6 (5th Cir. 1985).

The denial of appointment of counsel entered in this case fails the first prong of the Cohen test because it does not "close the matter for all time". See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 278 (1988)(quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 n. 14, (1983)). The denial of appointed counsel usually indicates "nothing more than that the district court is not completely confident of the propriety of [court appointed counsel] at that time." See Gulfstream Aerospace, 485 U.S. at 278. If a case, as it develops, becomes more complex both legally and factually, then a district court has the opportunity to reconsider the decision to deny appointment of legal counsel. See Holt, 862 F.2d at 852. Therefore, an order denying appointed counsel is such that a "district court ordinarily would expect to reassess and revise . . . in response to events occurring 'in the ordinary course of litigation,'" Gulfstream Aerospace, 485 U.S. at 278 (quoting Moses H. Cone Memorial Hosp., 460 U.S. at 12 n. 14), thus it fails the first prong of the Cohen test.

An order denying appointment of counsel also fails the second prong of the Cohen test because it is not "completely separate from the merits of the action." This is so because in making the determination, the court considers the merits of the plaintiff's claim, and

whether the claim is factually or legally so complex as to warrant the assistance of counsel. See Jackson v. Dallas Police Dept., 811 F.2d 260, 261-61 (5th Cir. 1986); Hodge v. Police Officers, 802 F.2d 58, 60-61 (2d Cir. 1986); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

If the court considers factual or legal issues in determining whether to appoint or deny appointment of counsel, then that decision flows naturally from the merits of the case, so the appointment decision is so enmeshed with the merits of the case that it can not be completely resolved separate from the case. Therefore, an order denying counsel also fails the second prong of the Cohen test. See Miller v. Simmons, 814 F.2d 962, 966 (4th Cir.) (holding that denial of appointment fails the second prong of the Cohen test and stating that [i]n reaching the question of whether the Court below properly exercised its discretion in declining to appoint counsel for the plaintiff, this Court would necessarily become "enmeshed" in the consideration of issues which are not wholly separate from the merits of the case; thus, the second tier of the Cohen exception is not met in this appeal") *cert. denied*, 484 U.S. 903 (1987); Wilborn v. Escalderon, 789 F.2d 1328, 1330 (9th Cir. 1986) (stating that denial of counsel in a civil rights action brought under section 1983 does not resolve an important issue completely separate from the merits); Kuster v. Block, 773 F.2d 1048, 1049 (9th Cir. 1985)(holding that an order denying appointment of counsel fails the second Cohen condition and is therefore not immediately appealable."); See also Smith-Bey v. Petsock, 741 F.2d 22, 25-25 (3d Cir. 1984); Appleby v. Meachum, 696 F.2d 145, 147 1st Cir. 1983); Miller v. Pleasure, 425 F.2d 1205, 1206 (2d Cir. 1970).

Finally, the decision to appoint or deny appointment fails the third prong of the Cohen test because the decision is not effectively unreviewable on appeal from a final judgment. "To be appealable as a final collateral order, the challenged order must constitute a 'complete, formal,

and, in the trial court, final rejection,' of a claimed right 'where denial of immediate review would *render impossible any review whatsoever.*' " Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981)(emphasis added). Denial of a motion to disqualify counsel does not meet this rigid standard because there are several remedies available to those who wish to appeal the decision. If the court of appeals determines that disallowing appointed representation was a prejudicial error, it would still retain its usual authority to vacate the judgment and order a new trial. Id. at 378.

Although the Fifth Circuit, in Robbins v. Maggio, 750 F.2d 405, 412-13 (5th Cir. 1985), decided that an order denying appointed counsel is effectively unreviewable on appeal because "there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case, resulting in the loss of vital civil rights claims, the Eleventh Circuit has since moved from this position. In Holt, the court declined to follow that view, agreeing with the 4th Circuit that it is just as "reasonable to believe that a *pro se* litigant who has the ability to perfect an immediate appeal upon denial of appointment of counsel by the district court would be equally able to raise the denial of appointment of counsel should he be unsuccessful on the merits and take a final appeal in the matter." See Miller v. Simmons, 814 F.2d 962, 967 (4th Cir.), *cert. denied*, 484 U.S. 903, (1987).

Moreover, even if an order denying appointed counsel causes some section 1983 litigants to abandon their claims "this does not mean that such an order satisfies the third prong of the Cohen test. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). In Coopers, this Court held that simply because an interlocutory order may induce a party to abandon his claim before final judgment is reached, it is "not a sufficient reason for considering it a 'final decision'

within the meaning of §1291. Id. at 476. As a result, the Holt court made the connection that, "the "death knell" doctrine as an exception to the final judgment rule is separate from the Cohen test and does not require that an order denying appointed counsel be deemed "effectively unreviewable on appeal from a final judgment" simply because there is a chance that a litigant will abandon his claim as a result of the order. See Holt v. Ford, 862 F.2d 1523, 854 (11th Cir. 1989) (citing Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301, 1310 n. 22 (9th Cir. 1981) (holding that the death knell doctrine is "entirely different" from Cohen test and does not apply to "abandonment of a claim out of self recognized inability to litigate a complex civil case"). In Hodges v. Dept. of Corrections, State of Georgia, 895 F.2d 1360, 1361 (11th Cir. 1990), the Eleventh Circuit extended the holding in Holt to find that a denial of a motion for appointment of counsel in Title VII employment discrimination claims were not immediately appealable under Cohen.

Merely postponing review of an order denying appointment of counsel does not result in the complete denial of appellate review, so a district court's order to deny appointment of counsel fails the third prong of the Cohen test. See Miller v. Simmons, 814 F.2d 962, 966-67 (4th Cir.), *cert. denied*, 484 U.S. 903 (1987); Smith-Bey v. Petsock, 741 F.2d 22, 25-26 (3d Cir. 1984); Appleby v. Meachum, 696 F.2d 145, 146 (1st Cir. 1983); Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1066-67 (7th Cir. 1981); Cotner v. Mason, 657 F.2d 1390, 1391-92 (10th Cir. 1981).

In Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985) this Court stressed the narrow nature of the Cohen doctrine, holding that its "reach is limited to trial court orders affecting rights that will be *irretrievably lost* in the absence of immediate

appeal." Id. Even before Holt was decided in 1989, the Eleventh Circuit was moving away from requiring immediate appeals from appointment orders. See Hunter v. Dept of the Air Force Agency, 846 F.2d 1314, 1317 (11th Cir. 1988)(holding that Cohen is a permissive doctrine allowing an immediate appeal but not does not require one). Because a plaintiff may bring an appeal based on denial of appointment of counsel after judgment is rendered, plaintiff does not lose the right to appeal, the requirement of the third prong of the Cohen test can not be satisfied.

The Eleventh Circuit applied the rational from Hunter to the three prong Cohen test a year later, when it held in Holt, that these orders are **only** appealable after final judgment is rendered. See Holt v. Ford, 862 F.2d 850, 855 (11th Cir. 1989)(stating that "[p]ostponing review of an order denying appointed counsel does not result in effective denial of review; consequently, such an order does not satisfy the third requirement of the Cohen")(emphasis added).

CONCLUSION

According to Cohen, an interlocutory appeal stemming from the denial of an appointment of counsel under 28 U.S.C. §1915(e)(1) or 42 U.S.C. §2000e-5(f)(1) fails all three prongs of the test. This result is consistent with the logic behind Cohen and promotes judicial efficiency by granting trial courts deference to try cases before them on the merits without constant interference from the appellate court.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

Gregg A. Toomey

Mark E. Levitt

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by US Mail this ____ day of _____, 2009, to CHRISTIAN F. MEISTER, Pro Se, P.O. Box 60662, Fort Myers, FL 33906.

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