1992 WL 97806
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Harold L. SIMMONS, et al., Plaintiffs,
v.
The CITY OF KANSAS CITY, KANSAS, et al., Defendants.

CIV. A. No. 88–2603–O.
|
April 13, 1992.

Attorneys and Law Firms

John H. Fields, Blaise R. Plummer, Carson & Fields, Kansas City, Kan., for plaintiffs.

Daniel B. Denk, McAnany, Van Cleave & Phillips, P.A., Harold T. Walker, Steve A.J. Bukaty, Blake & Uhlig, Kansas City, Kan., for defendants.

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

***1** This matter is before the court on plaintiffs' motion for an order certifying an interlocutory appeal pursuant to 28 U.S.C. § 1292 (Doc. # 182). For the reasons set forth below, the motion will be denied.

Plaintiffs filed this action challenging the constitutionality of the police promotion testing procedures utilized by the defendant City of Kansas City, Kansas. On March 16, 1992, the court issued a memorandum and order disposing of several pending motions. In part, the court denied plaintiffs' motion in support of the application of the Civil Rights Act of 1991 ("the Act") and request to conform the pretrial order. Plaintiffs now urge the court to amend the March 16, 1992, order pursuant to 28 U.S.C. § 1292(b) to allow them to seek interlocutory review of the order.

Title 28, United States Code, Section 1292(b) provides, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Thus, to properly certify an issue for interlocutory appeal, the court must find that: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists with respect to that question of law; and (3) an immediate appeal would materially advance the ultimate termination of the case. *Kirchen v. Guarantee Nat'l Ins. Co.,* 422 F.Supp. 58, 60–61 (E.D.Wis.1976).

Upon review, the court finds that the March 16, 1992, order fails to satisfy each of the three requisites of section 1292(b). The court acknowledges that the question of whether discriminatory discharge claims are actionable under section 1981 is a controlling question of law. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.1974), *cert. denied,* 419 U.S. 885 (1974) (holding that a question is "controlling" if error in its resolution would warrant reversal of a final judgment or dismissal). However, the court does not believe, despite plaintiffs' arguments to the contrary, that a substantial ground for difference of opinion exists with respect to the issue. Although the Tenth Circuit has not ruled on this issue, *see Max Daetwyler Corp. v. Meyer,* 575 F.Supp. 280, 283 (E.D.Pa.1983) ("the mere fact that the appeal would present a question of first impression is not, of itself, sufficient to show that the question is one on which there is a substantial ground for difference of opinion."), the majority of district courts addressing the issue have held that the Act is not to be applied retroactively. Further, the Sixth Circuit Court of Appeals, the only circuit to have ruled on the issue, held likewise. *See Vogel v. City of Cincinnati,* 959 F.2d 594, 1992 WL 45451 (6th Cir.1992). As for the third requisite, the court is not convinced that an immediate appeal would materially advance the termination of this litigation. In conclusion, the court finds no basis for certifying its order of March 16, 1992, for interlocutory appeal.

***2** IT IS THEREFORE ORDERED that plaintiffs' motion for an order certifying an interlocutory appeal pursuant to 28 U.S.C. § 1292 (Doc. # 182) is denied.

All Citations