UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER, Plaintiff, v. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the Kenosha Unified School District No. 1, Defendants.	Civ. Action No. 2:16-cv-00943-PP Judge Pamela Pepper

PLAINTIFF'S CIVIL L. R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO RECONSIDER CERTIFICATION OF ORDER DENYING MOTION TO DISMISS FOR INTERLOCUTORY APPEAL

Pursuant to Civil Local Rule 7(h) and Fed. R. Civ. P. 60, Plaintiff respectfully submits this expedited motion to reconsider the portion of the Court's Order Denying Defendants' Rule 12(b)(6) Motion to Dismiss the Amended Complaint [Dkt. No. 29] ("Order") that certifies the Court's order for interlocutory appeal by Defendants.[1] Certification of the Order does not materially advance the termination of this litigation; rather, it would slow proceedings down both in this Court and in the Seventh Circuit. The Order denies Defendants' motion with respect to multiple claims and multiple theories of relief. While some of the disputes that the Order resolves are based on unsettled and purely legal issues which on their own might properly be the

[1] Plaintiff refers to the following text in the Order: "The court concludes that the reasoning supporting this decision, and the decision itself, involve a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* at 2.

subject of an interlocutory appeal, the Order also resolves fact-bound questions involving well-settled principles of law that will be the subject of continued proceedings in this Court no matter how an appeal turns out. In particular, this Court found that Plaintiff stated claims under multiple theories of relief for his claims under Title IX of the Education Amendments of 1972 ("Title IX") and the Equal Protection Clause, at least one of which (sex stereotyping) is not a matter of first impression in this Circuit and is not readily resolved without further factual development.

At the conclusion of the hearing on September 20, 2016, Defendants' counsel advised the Court that Defendants intended to seek an interlocutory appeal of the Court's ruling denying Defendants' Motion to Dismiss and would submit a proposed order for the Court's review. Defendants filed a proposed order [Dkt. No. 27] after business hours on September 20, 2016. The Court did not entertain argument on the question of whether an interlocutory appeal was appropriate in this case. The Court signed the proposed order, with modifications, on the morning of September 21, 2016. Defendants have offered no argument as to why the requirements of certification have been met and Plaintiff has had no opportunity to respond.

A defendant may not appeal a denial of a motion to dismiss as a matter of right. However, under 28 U.S.C. § 1292(b), "the court of appeals in its discretion [may] hear an interlocutory appeal if the district court certifies that the appeal presents '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.'" *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012) (quoting 28 U.S.C. § 1292(b)); *see also U.S. v. Wis. Bell, Inc.*, No. 08-cv-0724, 2016 WL 3222843, at *1 (E.D. Wis. Jan. 20, 2016) ("there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation") (citing *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000)). Each of these factors must be present for the

order as a whole, not just for individual questions resolved by the order, since the entire order is certified for interlocutory appellate review. As the Seventh Circuit has noted,

> Interlocutory appeals are frowned on in the federal judicial system. They interrupt litigation and by interrupting delay its conclusion; and often the issue presented by such an appeal would have become academic by the end of the litigation in the district court, making an interlocutory appeal a gratuitous burden on the court of appeals and the parties, as well as a gratuitous interruption and retardant of the district court proceedings.

Sterk, 672 F.3d at 536. "Interlocutory appeals should only be granted when the applicant can show exceptional circumstances that justify a departure from the basic policy of postponing appellate review until after a final judgment is entered." *Alloc, Inc. v. Pergo, Inc.*, 572 F. Supp. 2d 1024, 1029 (E.D. Wis. 2008) (citing *Fisons Ltd. v. U.S.*, 458 F.2d 1241, 1248 (7th Cir.1972)).

In its Motion to Dismiss decision, the Court recognized that the question of Title IX's application to gender identity discrimination is a matter of first impression in this Circuit and that "there clearly are factual and legal disputes between the parties" on that issue. Court Minutes [Dkt. No. 28] at 5. Resolution of this question at this juncture, however, is not controlling on the outcome of the case as other plausible theories of relief exist under Plaintiff's claims for which this Court did not make similar findings of contestability. As the Court further acknowledged, "regardless of whether Title IX provides protections for transgender persons, the plaintiffs have also alleged sufficient facts to sustain a gender stereotyping claim." *Id*. at 7. The Court made similar findings with respect to Plaintiff's Equal Protection claims. *Id.* at 8.

Sex stereotyping is a well-established theory of relief for which there is no "substantial ground for difference of opinion." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 2016 WL 403973, at *2 (7th Cir. July 28, 2016); *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008). Regardless of the ultimate resolution of the question of Title IX's application to gender

identity discrimination, Plaintiff may independently succeed on the merits under a sex stereotyping theory. Because Plaintiff was not required to plead legal theories in his complaint, *Avila v. CitiMortgage, Inc.*, 801 F.3d 777, 783 (7th Cir. 2015), and at least one well-established theory of relief is available here, an interlocutory appeal would do nothing to "speed up" the resolution of this case (even if it might resolve some legal questions raised by the complaint).

Plaintiff requests the opportunity to develop the factual record and proceed to a trial on the merits of his claims without the distraction and delay of an interlocutory appeal on the disputed, non-dispositive questions of law raised in the Motion to Dismiss.

For these reasons, Plaintiff respectfully moves this Court to grant this motion and rescind the portion of its Order that certified the denial of the Motion to Dismiss for interlocutory appeal.

Dated: September 22, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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** Application for admission to this Court to follow*