UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,

Plaintiff,

Civ. Action No. 2:16-cv-00943

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.

DEFENDANTS' CIVIL L. R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION FOR RELIEF FROM THE ORDER GRANTING PLAINTIFF'S MOTION TO RECONSIDER CERTIFICATION FOR INTERLOCUTORY APPEAL OF ORDER DENYING MOTION TO DISMISS, AND VACATING CERTIFICATION. (DKT. NO. 36).

Defendants, respectfully submit this expedited motion pursuant to Civil L. R. 7(h), for relief under Fed. R. Civ. P. 60(b), seeking relief from the Court's September 24, 2016 order granting Plaintiff's motion to reconsider (Dkt. No. 36), and the accompanying amended order (Dkt. No. 35). Fed. R. Civ. P. 60(b) allows such relief:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> > (1) mistake, inadvertence, surprise, or excusable neglect;
> > (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> > (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> > (4) the judgment is void;
> > (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> > (6) any other reason that justifies relief.

Grounds for relief exist here as the order is void, as well as other reasons that justify Defendants' requested relief. Plaintiff filed a motion for reconsideration on Thursday, September 22, 2016, under Civil L. R. 7(h). (Dkt. No. 30). The Court ruled on Plaintiff's motion on September 24, 2016, and issued its Order the next day. (Dkt. No. 36). All of this occurred without Defendants having had the opportunity to even respond to Plaintiff's motion, and this violates Local Rule 7(h).

Under L. R. 7(h) parties may seek non-dispositive relief by expedited motion. The Court may schedule the motion for hearing or may decide the motion without hearing. L. R. 7(h)(1). The Court may also order an expedited briefing schedule. *Id.* However, absent such an expedited schedule, Local Rule 7(h) states that the "respondent **must** file a memorandum in opposition to the motion within 7 days of service of the motion, unless otherwise ordered by the Court." L. R. 7(h)(2) (emphasis added).

A district court errs by ruling on a motion without allowing the other party time in which to file a responsive brief when a rule allows such a response. *See Aspacher v. Kretz*, No. 94 C 6741, 1997 WL 311967, at *3 (N.D. Ill. June 5, 1997). Because the Court mistakenly or inadvertently granted Plaintiff's motion without allowing Defendants seven days to file a response, or, alternatively, without establishing an expedited briefing schedule, the Defendants have grounds for relief from the Court's Order granting Plaintiff's motion for reconsideration (Dkt. No. 36) and the amended order denying Defendants' motion to dismiss (Dkt. No. 35).

Defendants have been prejudiced by the Court's denial of their right to respond to Plaintiff's motion. Defendants need the opportunity to address the requirements of 28 U.S.C. § 1292(b). That statute provides a district court with the discretion to certify an order for interlocutory review when 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." A formal motion was not required for the Court to certify an order for interlocutory review. *See* Fed. R. App. P. 5(a)(3) ("If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement.").

In its order, the Court articulated that it did not find that the factors set forth in 28 U.S.C. § 1292(b) were met, at least in part, because the Court denied Defendants' motion to dismiss on several grounds and did not believe that all involved a controlling question of law. *See* (Dkt. No. 36), at 7. It is critical that Defendants have the opportunity to respond to Plaintiff's motion and to

address whether the motion dismiss involved a controlling issue of law.[1] The Seventh Circuit has stated that: "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Kostal v. Life Ins. Co. of N. Am.*, No. 09-CV-31-JPS, 2011 WL 5374432, at *1 (E.D. Wis. Nov. 7, 2011) (citing *Sokaogon Gaming Enterprise Corp. v. Tushie–Montgomery Associates, Inc.*, 86 F.3d 656, 659 (7th Cir. 1996)). Moreover, whether a complaint states a claim under the standard for pleading set forth in *Twombly* is a controlling question of law appropriately reviewed on an interlocutory appeal, because if the complaint does not state a claim, the case is likely to be over. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 624-25 (7th Cir. 2010).

The Court agreed that whether discrimination based on transgender status constitutes discrimination based on sex under Title IX was a controlling question of law appropriate for interlocutory review that would contribute to the early determination in a wide spectrum of cases. (Dkt. No. 36), at 7. This issue, however, is necessarily related to the question of sex-stereotyping because if the Seventh Circuit makes a determination that the meaning of the term "sex" in Title IX is the sex listed on one's birth certificate, then none of the allegations in the Amended Complaint could possibly be actionable sex-stereotyping. Defendants are entitled to respond to this argument as well.

Therefore, Defendants' respectfully request that the Court vacate the order granting Plaintiff's motion for reconsideration (Dkt. No. 36), and the accompanying amended order denying Defendants' motion to dismiss (Dkt. No. 35), and permit Defendants to file a memorandum in opposition to Plaintiff's motion in accordance with L. R. 7(h)(2).

[1] Defendants identify some of the issues and some of the arguments that they would address in response to Plaintiff's motion. This should not be viewed as a full and complete response as that is beyond what could be accomplished in this three-page expedited brief.

Dated this 27th day of September, 2016.

MALLERY & ZIMMERMAN, S.C.
Attorneys for Defendants

By: s/Ronald S. Stadler
Ronald S. Stadler
State Bar No. 1017450
Aaron J. Graf
State Bar No. 1068924
Jonathan E. Sacks
State Bar No. 1103204

731 North Jackson Street, Suite 900
Milwaukee, Wisconsin 53202-4697
telephone: 414-271-2424
facsimile: 414-271-8678
e-mail: rstadler@mzmilw.com
agraf@mzmilw.com
jsacks@mzmilw.com