IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

IN RE: EMPLOYMENT DISCRIMINATION LITIGATION AGAINST THE STATE OF ALABAMA:	)	
EUGENE CRUM, JR. , et al. Intervenor-Plaintiffs,	)	CIVIL ACTION NO. 94-T-356-N
v.	)	JUDGE MYRON H. THOMPSON
STATE OF ALABAMA et al..,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RULE 54(b) JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. §1292(b)

Pursuant to this Court's Order (doc. no. 742), plaintiffs submit the following response to the defendants' Motion for Rule 54(b) Judgment, or in the Alternative, Motion for Certification Pursuant to 28 U.S.C. §1292(b) of this Court's denial of defendants' Motion for Summary Judgment (doc no. 701). For the reasons that follow, the defendants' Motion should be denied.

1. Certification under Rule 54(b)

Federal Rule of Civil Procedure 54(b) provides that "[w]hen more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Defendants' request for this Court to designate its denial of summary judgment as a final ruling under 54(b) is not proper under this Rule, as the Court's denial of summary judgment was not an "entry of a final judgment as to one or

more but fewer than all of the claims," nor could it be certified as such, as defendants sought, but were denied, "summary judgment on the remaining claims in this action" Def. Motion for Summary Judgment (doc .no. 701) at 1. As the Eleventh Circuit has held, "A judgment properly may be certified under the terms of Rule 54(b) only if it possesses the requisite degree of finality. That is, the judgment must completely dispose of at least one substantive claim . . . A district court has the discretion to certify a judgment for immediate appeal only when it is 'final' within the meaning of Rule 54(b), which means that the judgment disposes entirely of a separable claim or dismisses a party entirely." *In re Southeast Banking Corp*., 69 F.3d 1539,1547 (11th Cir. 1995). This Court's denial of defendants' summary judgment motion does neither of these things - it does not dispose of any claim in the case, much less a "separable" one, and does not dismiss any party from the case. As such, 54(b) certification is inappropriate.

In deciding whether to enter a Rule 54(b) determination, courts use a two-pronged inquiry. First, "[a] district court must . . . determine that it is dealing with a 'final judgment.' It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 7 (1980), quoting *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 436 (1956). The denial of a motion for summary judgment generally is not a final judgment for purposes of appellate jurisdiction. *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 1002 (11th Cir. 1995). *See also U.S. v. Florian*, 312 U.S. 656 (1941)(reversing judgment in the circuit court of appeals for want of jurisdiction because of the absence of a final judgment in the district court). As Wright and Miller state:

> A denial of summary judgment indicates that the moving party has failed to establish that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law; a trial

> therefore is necessary. As a result, the denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. At that time, the party who unsuccessfully sought summary judgment may argue that the trial court's denial of the Rule 56 motion was erroneous.

10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure §2715.

In the event that the Court determines that its denial of summary judgment does constitute a "final judgment," the Court must also find, under the second prong of the Rule 54(b) inquiry, that there is no "just reason for delay." *Curtiss-Wright,* 446 U.S. at 8. In making that determination the Court is to take into account "judicial administrative interests as well as the equities involved" with an eye towards preserving "the historic federal policy against piecemeal appeals." *Id.* The notes of the Advisory Committee accompanying Rule 54(b) observe that the Rule was intended to be reserved for "the infrequent harsh case." As a result, "requests under Rule 54(b) are granted neither routinely nor as a matter of course." *Architectural Floor Products Co. v. Don Brann and Associates Co.,* 551 F.Supp. 802, 807 (N.D.Ill.1982). The moving party "bears the burden of showing it will suffer unjust harm if final judgment is delayed." *Id.* at 808. Here, the defendants have made no attempt to show that they will suffer any harm if the Court denies their request for 54(b) certification. Defendants simply posit that "there is no just reason for delay in appealing this order and because resolution of this matter ultimately could result in the termination of major claims pending this action and possibly the entire litigation." Def. Motion at ¶2. Defendants, however, have already conceded that the plaintiffs may proceed in prosecuting their Title VII claims and §1981 claims independently of and without relying on *Frazer* (*see* Def. Memorandum of Law in Support of Motion for Summary Judgment at 30), and plaintiffs have already informed the Court that their claims are not based on violations of the *Frazer* injunction. Based on these representations, the Court denied defendants' Motion for Summary Judgment. Defendants can identify no harm in allowing plaintiffs to proceed

on claims which defendants themselves concede are still available to the plaintiffs. For these reasons, defendants' request for Rule 54(b) certification should be denied, and the plaintiffs permitted to proceed on the merits of their claims.

2. Defendants' request for certification under 28 U.S.C. §1292(b) should be denied because it does not identify a controlling question of law and appeal of the denial of summary judgment will not materially advance this litigation.

In addition to their request for certification under Rule 54(b), defendants have asked this Court to certify its summary judgment denial for immediate interlocutory appeal pursuant to 28 U.S.C. §1292(b). This request should be denied.

In order for a Court to certify an order for immediate appeal, when such an order is not appealable of right, under 28 U.S.C. §1292(b), the Court must find two things: (1) that the order involves "a controlling question of law as to which there is substantial ground for difference of opinion"; and (2) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* Defendants have shown neither. With regard to the first element, defendants fail to identify in their Motion for Certification what the controlling question of law is that forms the basis for their request under §1292. Defendants' Motion for Certification does ask the Court to find that its Order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," without providing a statement identifying what that controlling question of law is. Defendants' Motion for Summary Judgment did not raise, and this Court did not rule on, any questions of law requiring resolution by the Eleventh Circuit Court of Appeals. Defendants' Motion was simply based on the theory that because the plaintiffs had sought to rely on violations of the *Frazer* injunction as one method of proving their claims, and this Court denied them the opportunity to do so, all of their claims should be dismissed. Recognizing that plaintiffs still have viable Title VII and 42 U.S.C. §1981 claims for discrimination, this Court denied

the defendants' Motion. The Eleventh Circuit had already ruled on the question of the plaintiffs' rights to pursue claims based on the *Frazer* orders, and found that they could not. Defendants' arguments on summary judgment were case-specific and based solely on the unique procedural history of the *Crum* and *Frazer* litigations. The Eleventh Circuit, like all circuits, has been very careful to limit its review of issues presented under §1292(b) to questions of law. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1275 &n.4 (11th Cir. 1999)("We construe the district court's certification under 28 U.S.C. §§ 1292(b) as certifying only these two questions, which would seem to be the controlling questions of law as to which there may be substantial ground for difference of opinion; or, in any event, we exercise our discretion to address only these two questions. The parties expend much of their briefs addressing, *inter alia,* several arguments relating to the sufficiency of the allegations. We decline to address such arguments, or any other arguments other than the two issues indicated in the text."). Because defendants have not pointed to any particular controlling question of law requiring resolution by the Court of Appeals, and because the parties and the Court appear to have a mutual understanding of the present scope of the plaintiff's claims, defendants' request for certification under 28 U.S.C. §1292(b) should be denied.

Not only must defendants show that the district court's disqualification order contains "a controlling question of law as to which there is substantial ground for difference of opinion," defendants must also show that "an immediate appeal from the order ***may materially advance the ultimate termination of the litigation***." 28 U.S.C. §1292(b)(emphasis supplied). It is difficult to see how allowing defendants to pursue their summary judgment motion in the Eleventh Circuit could materially advance the ultimate termination of the litigation, as defendants have already conceded that plaintiffs may proceed on their Title VII and §1981 discrimination claims. Defendants sought summary judgment on plaintiffs' claims based on the *Frazer* injunctions. Plaintiffs have already

conceded that they are not pursuing such claims, and defendants have not objected to plaintiffs' pursuit of their Title VII and §1981 claims for discrimination that do not rely on the *Frazer* injunction. The question of whether the plaintiffs can pursue claims based on *Frazer* has already been decided by the Eleventh Circuit, and defendants have not presented any question to the Court in their Summary Judgment brief that has not already been answered by the Eleventh Circuit in the earlier appeals regarding the *Frazer* enforcement claims. As such, 1292(b) certification would not materially advance any aspect of this litigation, because the scope of the plaintiffs' claims is well-defined and none of the claims asserted by the plaintiffs is based on a violation of the *Frazer* orders. Defendants' request for 1292(b) certification should therefore be denied.

Respectfully submitted,

s/ Kell Simon

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following (or by U.S. Mail to the non-CM-ECF participants):

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