UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DEREK R. HENKLE,

Plaintiff,

vs.

ROSS GREGORY, in his official and individual capacity, DENISE HAUSAUER, LORETTA RENDE, JOE ANASTASIO, ROBERT FLOYD, SERENA ROBB, ARNEL RAMILO, and GLEN SELBY, in their individual capacities; and the WASHOE COUNTY SCHOOL DISTRICT, a political subdivision of the State of Nevada,

Defendants.

CV-N-00-050-RAM

ORDER

Plaintiff has filed a Motion for Reconsideration, or Alternatively, Leave to Amend; and for Certification Pursuant to 28 U.S.C. § 1292(b) (Doc. #57). Defendants have opposed the Motion (Doc. #59) and Plaintiff has replied (Doc. #60).

Reconsideration is appropriate where (1) the court is presented with newly discovered evidence; (2) the court committed clear error; (3) the initial decision was manifestly unjust; (4) there has been an intervening change in controlling law; or (5) there are other highly unusual circumstances warranting reconsideration. *See School Dist. No. 1J v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

A. MOTION FOR RECONSIDERATION

Plaintiff requests reconsideration of the court's ruling dismissing the First Claim for Relief which is a § 1983 claim for Equal Protection violations based on sexual orientation discrimination. Plaintiff claims that this claim cannot properly subsumed under *Middlesex Co. Sewerage Auth. v. National Sea*

61

Clammers, 453 U.S. 1 (1981) and its progeny because claims based solely on sexual orientation are not actionable under Title IX. On further review of this matter, and in view of a recent decision of the Ninth Circuit Court of Appeals, the court believes that Plaintiff is correct and his Motion for Reconsideration should be granted and the First Claim for Relief reinstated.

Title IX provides that: "[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded educational programs or activities. 20 U.S.C. § 1681(a) (emphasis added). Other courts have recognized that Title IX only prohibits discrimination based on sex and not other forms of discrimination. *See Montgomery v. Independent Sch. Dist. No. 709*, 109 F.Supp.2d 1081, 1089-90 (D.Minn. 2000). Given this interpretation, a claim for discrimination based solely on sexual orientation should not be precluded by the *Sea Clammers* doctrine because the application of *Sea Clammers* is appropriate only when the statute (Title IX in this case) provides a comprehensive remedy.

The Supreme Court has looked to Title VII case law as an aid in interpreting Title IX. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). Utilizing that analogy, the Ninth Circuit has recently held that although Title VII prohibits discrimination on the basis of "sex" it does not provide a remedy for discrimination based on sexual orientation. *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001). The rule should be no different for Title IX.

Based on the above, the court concludes that it erred in applying the *Sea Clammers* doctrine to, and dismissing, Plaintiff's First Claim for Relief.

B. MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Plaintiff also seeks certification of an interlocutory appeal pursuant to 28 U.S.C. 1292(b). This statute is an exception to the general rule that an appellate court should not review a district court's ruling until after final judgment, and exists for those exceptional circumstances when considerations of judicial economy and fairness demand interlocutory review of an order. *Coopers & Lybrand v.*

Livesay, 437 U.S. 463, 474-75, 98 S.Ct. 2454, 2460-61, 57 L.Ed.2d 351 (1978); *Fukuda v. County of Los Angeles*, 630 F.Supp. 228, 229 (C.D. Cal. 1986).

Section 1292(b) identifies three factors that must be present in order for the court to certify an appeal. First, the issue must involve a controlling issue of law. The issue must be such that "resolution . . . on appeal could materially affect the outcome of the litigation in the district court." *In Re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982); *Shurance v. Planning Control Int'l., Inc.*, 839 F.2d 1347, 1347-48 (9th Cir. 1988).

Second, there must be a substantial ground for difference of opinion on the issue. *Kern-Tulare Water Dist. v. Bakersfield*, 634 F.Supp. 656 (E.D. Cal. 1986).

Third, the interlocutory appeal must be likely to materially speed the termination of the litigation. This factor is linked to the first factor in that the court should consider the effect of a reversal on the management of the case. Additionally, because the statute should only be used in exceptional circumstances the court should consider whether litigation flowing from the order permitting an interlocutory appeal would be "protracted and expensive." *In Re Cement Antritrust Litig.*, 673 F.2d at 1026. If the interlocutory appeal would actually delay the conclusion of litigation, the court should not certify the appeal. *See Shurance*, 839 F.2d at 1348 (refusing to hear certified appeal in part because decision of Ninth Circuit might come after scheduled trial date).

Although the claims dismissed by the court limit the scope of Plaintiff's case, the order disposes of only three claims for relief, not the entire case. As the resolution of these claims on appeal would have some impact on the case, but not be dispositive, the proposed interlocutory appeal does not involve a controlling issue of law.

If the court certified an interlocutory appeal and stayed the proceedings, the trial in this case would be delayed many months while the court waited for a ruling. Even if the Ninth Circuit ruled in favor of the Plaintiff, this matter would still have to be tried in a substantially similar fashion. If the court did not stay the proceedings, there is a good possibility that the Ninth Circuit would not decide the appeal until after the trial was set to commence, which would also delay termination of this case.

Additionally, the interlocutory appeal would be protracted and expensive and not materially speed the termination of this litigation, however it was decided.

Considering all of the factors, Plaintiff has failed to demonstrate exceptional circumstances warranting interlocutory review of the court's February 28, 2001, order. While there is substantial ground for difference of opinion based on the split of authority cited in the order itself, the issue is not a controlling issue, and certification of an appeal will not materially speed the termination of this litigation.

C. CONCLUSION

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration (Doc. #57) is **GRANTED** and Plaintiff's First Claim for Relief is reinstated.

IT IS HEREBY FURTHER ORDERED that the Motion for Certification of Interlocutory Appeal (Doc. #57) is **DENIED**.

IT IS HEREBY FURTHER ORDERED that Plaintiff's Request for a Ruling on Defendants' Qualified Immunity Defense is **DENIED** as moot as Plaintiff has withdrawn that request.

DATED: May 22, 2001.

UNITED STATES MAGISTRATE JUDGE