2002 WL 598350
United States District Court,
S.D. Indiana,
Indianapolis Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
PREFERRED MANAGEMENT CORPORATION, d/b/a, Preferred Home Health Care, Preferred Medical Care, Inc., Preferred Home Health Care–Vincennes, Inc., d/b/a Preferred Home Health Care–Lafayette, and Preferred Home Health Care–Vincennes, d/b/a Preferred Home Health Care–Vincennes, Defendants.

IP 98–1697–C–B/S. | April 5, 2002.

Attorneys and Law Firms

Jo Ann Farnsworth, Equal Employment Opportunity Comm, Indianapolis, IN, for plaintiff.

Daniel C Emerson, Bose McKinney & Evans, Indianapolis, IN, for defendants.

Opinion

ENTRY ON PREFERRED'S MOTION TO CERTIFY INTERLOCUTORY APPEAL

SARAH EVANS BARKER, District Judge.

***1** Preferred Management Corporation asks us to certify this case for an interlocutory appeal to the Seventh Circuit pursuant to 28 U.S.C. § 1292(b). For the following reasons, we decline to do so.

The statute governing interlocutory appeals such as the one requested here provides:

> (b) 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. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Seventh Circuit recently set forth a straightforward method for determining whether a district court should certify an interlocutory appeal. In *Ahrenholz v. Board of Trustees of the University of Illinois,* 219 F.3d 674, 675 (7th Cir.2000), the court held:

> There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: 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.

The court was adamant: "Unless *all* these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b)." *Id.*

Preferred does not mention the *Ahrenholz* analysis until its reply brief. Instead, it spends most of its opening brief rehashing the issues on summary judgment. The Seventh Circuit has made clear, however, that section 1292(b) was not designed to

"provide for an immediate appeal solely on the ground that such an appeal may advance the proceedings in the district court." *Id.* at 676, *quoting, Harriscom Svenska AB v. Harris Corp.,* 947 F.2d 627, 631 (2d Cir.1991).

Preferred does, however, address the question of whether there is a controlling issue of law the resolution of which will facilitate the proceedings. Preferred presents two questions to support its motion for certification. First, "whether the EEOC's pattern or practice claim presents an overly restrictive burden on Preferred's religious liberties preserved by the First Amendment and the RFRA." Second, "whether the proper focus in a religious harassment and discrimination claim should be on the religious beliefs of the complainant rather than the alleged discriminator." Def. Brief, p. 3. In view of the Seventh Circuit's discussion in *Venters v. City of Delphi,* 123 F.3d 956, 971–972 (7th Cir.1997)—which we addressed at some length in our Entry, e.g., pp. 70–71, 105, and particularly 108, and 108 n. 22—we find that the second issue does not present the kind of "substantial ground" for difference of legal opinion that section 1292(b) contemplates. Accordingly, it provides an inadequate basis for certification.

***2** As to Preferred's first question, it is not clear which of two arguments Preferred's first issue supports. One argument (the one that was at issue throughout the summary judgment proceedings) is that the EEOC's pattern or practice claim is constitutionally impermissible because, in order to establish it, the EEOC conducted an investigation into the religious beliefs and expressions of Preferred management and employees and relied on evidence deriving directly from protected religious belief and expression. The second argument, which we have had to extract from its brief in support of its motion for certification (see Def. Brief, p. 7), appears to be that the EEOC may *never* bring a pattern and practice claim against a private employer on the basis of religion because pattern and practice claims are *inherently* over broad; in other words, pattern or practice claims—brought by the government on the basis of religion—*by their very nature,* intrude on protected religious belief and expression. While the first argument presupposes the possibility of a valid EEOC pattern or practice suit based on religion, the second amounts to an argument that the very *theory* of a "pattern or practice" of discrimination, brought by the EEOC against a private employer on the basis of religion, is constitutionally impermissible.

This second argument—while it raises a highly significant issue and almost certainly would be controlling on the EEOC's pattern or practice claim—is raised here for the first time (assuming it is actually raised here at all). We have carefully reviewed Preferred's briefs on summary judgment and find in them no coherent argument for the proposition that pattern or practice claims, brought by the EEOC and based on religion, are intrinsically unconstitutional. We are confident that, in more than 100 pages submitted in the context of two briefs, counsel for Preferred would have made conspicuous such a far reaching (and easily articulated) argument. There is no reason to think that the Seventh Circuit would entertain an un-briefed and undecided issue on interlocutory appeal any more happily than it would consider such an issue on appeal of a final order. *Kelly v. Municipal Courts of Marion County, Ind.,* 97 F.3d 902, 910 (7th Cir.1996); *Teumer v. General Motors Corp.,* 34 F.3d 542, 545–46 (7th Cir.1994). In sum, we will not certify an order for interlocutory appeal on the basis of an issue which was not fully briefed and which we did not decide.

Preferred's other argument—that the EEOC exceeded its constitutional authority by conducting an overly intrusive investigation and used evidence which violated Preferred personnel's religious rights under the First Amendment and the RFRA—was one of the central issues in the parties' briefs and our Entry. It too is a significant issue of law about which there may be a difference of legal opinion, and, if the Seventh Circuit were to reverse our holding, it would be controlling on the outcome of the EEOC's pattern or practice claim. But we fail to see how the Seventh Circuit can address that question without conducting a full-scale review of the summary judgment record. Such review would defeat two facets of the certification process. First, it would not present a "pure" question of law in the sense that "the court of appeals could decide [it] quickly and cleanly without having to study the record." *Ahrenholz,* 219 F.3d at 377. And second, it would not help to "speed up" the litigation.

***3** For these reasons, we DENY Preferred's motion to certify our Order for interlocutory appeal.

Parallel Citations

88 Fair Empl.Prac.Cas. (BNA) 1437