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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT FAIRBANKS

ROBERT PROBERT and LORETTA E.)
PROBERT, and others similarly situated,)

Plaintiffs,)

vs.)

FAMILY CENTERED SERVICES OF)
ALASKA, INC.)

Defendants.)

Case No.: 4:07-CV-00030 RRB

MOTION FOR CERTIFICATION FOR APPEAL BY PERMISSION

1. Standard of Review

Defendant Family Centered Services of Alaska, Inc. (“FCS”) has moved this Court to certify its orders granting plaintiffs’ second motion for partial summary judgment and denying reconsideration, Dkt. 50 (January 22, 2009) and Dkt. 63 (February 26, 2009), for an immediate appeal under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5. The standard for an immediate appeal is found in 28 U.S.C. § 1292(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....

The statutory standards are met in this instance. This is an exceptional case with far-reaching consequences. The Court has decided the controlling issues of law, and the Court's rulings will seriously and adversely impact the provision of essential services to needy children in Alaska. There is clearly a substantial ground for differences of opinion on the Court's rulings, as they are contrary to, and are irreconcilable with, every reported judicial decision on the controlling issues. The Superior Court for the State of Alaska on a nearly identical wage claim recently reached opposite conclusions on the controlling issues, with the result that there are now two rules of law in Alaska. All other federal District Courts considering similar wage claims have reached decisions contrary to this Court's conclusions.

There are no Court of Appeals decisions in any Circuit addressing the controlling issues of federal law in this matter. An immediate appeal will allow the Ninth Circuit Court of Appeals to decide these issues of first impression in the Circuits, and will provide much needed guidance for the parties. Having definitive ruling on the controlling issues will materially advance the litigation.

2. Catastrophic Impact on Needy Children.

Before turning to the statutory factors for a permissive appeal, the impact of the Court's rulings in this case must be understood. This Court's orders will have devastating implications to FCS and to the children it serves. The following background explains why.

FCS is a non-profit organization for needy children. It provides critical housing and therapeutic services that are not available in the private sector for those without resources. Most children whom FCS serves come from severely dysfunctional, impoverished family situations. They need safe homes, regular meals, clean clothes and a stable, therapeutic family environment. FCS's family homes provide for these basic needs. See, Affidavit of Suszan Dale. FCS has seven family homes in the Fairbanks area. These currently provide homes for approximately thirty-five needy children. In addition, FCS has built one family home in Dillingham and is building three homes in Wasilla, all of which were scheduled to open shortly. If the Court's orders stand, the Fairbanks' homes may close and the others may not open. See, Affidavit of Kathy Cannone.

As with most social service agencies, personnel costs are the largest component of FCS's budget. FCS's house parents, including plaintiffs, are very well-compensated and are one of the highest paid groups in the agency. Plaintiffs Proberts, for example, received a total annual compensation package worth approximately \$125,550. See, Affidavit of Kathy Cannone. Under this Court's rulings, however, the annual cost of the Proberts' overtime pay and related costs, such as federal employment taxes, could be as high as \$218,610 if the Proberts can prove the validity of all hours they recorded on their timesheets¹, resulting in a total annual compensation package of \$344,160. Id. Medicaid pays for nearly all of the children's services (99.5%) and reimbursement from private insurance (.5%) accounts for the balance. Id. The actual amount of Medicaid services billed by the Proberts during their employment as home parents was \$218,195. Id. If the additional overtime were paid to the Proberts, the loss to FCS on this family

¹ FCS in no way concedes that the Proberts are owed any overtime compensation.
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home, alone, would amount to approximately \$178,867 annually. Id. If all FCS house parents were compensated at the same rate, the annual loss would be approximately \$1,252,069. Id.

This is simply untenable. Family Centered Services is a non-profit social services organization. It has no resources for the group homes other than program income from Medicaid, a small amount from private insurance, and no grant funds. See, Affidavit of Kathy Cannone. FCS cannot operate group homes at this loss level. Id. If this Court's orders stand, and these costs are required to operate the homes, the family homes will close.

The FCS family homes provide food, shelter, basic social services and human kindness to children who do not need to be institutionalized, but who have nowhere else to go. See, Affidavit of Suszan Dale. The impact of closure is potentially devastating, not only for these children, but for Alaska society as a whole. The children will, at best, be returned to unhealthy, dysfunctional family situations, with a concomitant lessening of their chances to become productive, healthy adults.

We now turn to the three statutory factors: whether this matter presents [1] a "controlling question of law" [2] "as to which there is substantial ground for difference of opinion" and [3] "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 USC § 1292(b).

3. "Controlling Question of Law."

There is no doubt that the Court's rulings involve "a controlling question of law." 28 USC § 1292(b). See, Hopkins v. Cornerstone Am., 545 F.3d 338, 342-343 (5th Cir. 2008). Plaintiffs sought a declaration that the Fair Labor Standards Act ("FLSA") applied to their work as FCS house parents. See, Dkt. 1. Their entire claim, and this entire action, is premised on that

theory, and the action could not proceed without establishing that the Act applied. With its recent orders, the Court has squarely ruled on that issue:

The Court finds that Defendant, through its Therapeutic Family Home is clearly “engaged in the operation of ... an institution primarily engaged in the care of the sick, ... mentally ill or defective who reside on the premises of such institution.” 29 USC §203(r). Accordingly, Defendant is subject to the overtime provisions of the Fair Labor Standards Act.”

Dkt. 84, at 8.

Thus, the first element is met. The Court has ruled on the controlling issue in this case, *i.e.*, whether the FLSA applies to FCS’s house parents. The Court’s rulings have called into substantial doubt the future existence of this critical children’s social services delivery model. If the rulings stand, the family home model will not be viable. The consequences will need to be dealt with quickly, both by FCS and by the many other social service agencies that employ similar service models.

4. “Substantial Ground for Difference of Opinion.”

The second statutory prong, whether “there is substantial ground for difference of opinion” on the controlling issues of law, 28 USC § 1292(b), is met here.

As this Court has repeatedly recognized, the issues in this matter have not been addressed by the Ninth Circuit. See, Dkt. 50, at 10 (“This issue appears to be a matter of first impression in the Ninth Circuit. Indeed, there are few case[s] in any circuit that address this specific issue.”) and Dkt. 63, at 10 (“This is a matter of first impression in this Circuit.”). In fact, as far as the parties have been able to determine, the controlling issues of law in this matter have not been decided by *any* Circuit. See, e.g., Dkt 35, at 3 (“To the best of Plaintiffs’ counsels’ knowledge, this issue has never been decided by an Appellate Court...”).

Courts other than the Ninth Circuit have, however, addressed the issue. This Court's rulings squarely conflict with those decisions. First, on February 28, 2008, the State of Alaska Superior Court granted summary judgment and dismissed a nearly identical wage claim brought by a house parent against Family Centered Services on the basis that the family home was not an "institution for the mentally ill" and was not covered by the FLSA:

...[T]he uncontradicted facts of the matter are that the FCS home that Powell was employed in was no more than a licensed residential child care facility that served as a home for needy children. The purpose of the home was to provide a safe stable home environment for its children; it is a home, not a treatment facility. No stretch of the facts in this case can bring FCS within the FLSA enterprise coverage.

Powell v. Family Centered Services of Alaska, Civ. No. 4FA-06-2438, (Alaska Superior Ct. February 29, 2008). See, Order Granting Summary Judgment and Dismissing Claims, p. 6, at Dkt 55, attachment # 1.

The Court's rulings have thus created two rules of law in the District of Alaska. With those rulings, the Alaska state and federal courts have reached entirely contradictory results on the controlling legal issues in this matter. The result will inevitably be forum shopping and legal uncertainty. That factor alone strongly weighs in favor of certification.

Second, every other federal District Court that has considered the issue has found that similar group homes were not covered by the FLSA. Kitchings v. Florida United Methodist, 393 F.Supp.2d 1282 (M.D. Fla. 2005); Bowrin v. Catholic Guardian Soc'y, 417 F. Supp. 2d 449, 463 (D.N.Y. 2006); Murray v. R.E.A.C.H., 908 F.Supp. 337 (W.D. N.C. 1995); Joles v. Johnson County Youth Service, 885 F.Supp. 1169 (S.D. Ind. 1995); Segali v. Idaho Youth Ranch, 738 F.Supp. 1302 (D. Id. 1990); Jacobs v. New York Foundling Hospital, 283 F.Supp.2d 251, 262 (E.D. N.Y. 2007). Again, there can be no doubt but that "there is substantial ground for difference

of opinion” when this Court’s rulings directly contradict other District Court decisions on the issue from across the nation. 28 USC § 1292(b).

The legislative history reveals that in enacting Sec. 203(r) and Sec. 203(s) of the FLSA, Congress referred to “hospitals and related institutions” and “hospitals, nursing homes and homes for the aged”, and explained that “[t]hese enterprises ... are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose.” See The New Wage and Hour Law Appendix 44-45, 48 (rev. 1967) (reprint of H. Rep. No. 89-1366); id. at Appendix 125-126 (reprint of S. Rep. No. 89-1487); id. at Appendix 197 (Excerpts from Congressional Debate); S. Rep. No. 89-1487 (1966), as reprinted in 1966 U.S.C.C.A.N. 3002, 3008-3010, 3015, 3027-3029. The legislative history is silent regarding any other “related institution”, other than “nursing homes” and “homes for the aged.” Id. There is no indication that Congress intended group homes for children to be included within Sec. 203(r) and (s). An immediate interlocutory appeal is appropriate. 28 USC § 1292(b).

The Ninth Circuit should be encouraged to resolve this issue as expeditiously as possible. There is a substantial difference between this Court’s opinion on this issue and those of the other state and federal courts. Immediate interlocutory appeal will “provide much needed guidance” for the parties and for other similarly situated individuals and organizations. Lucero v. Regents of the University of California, 1993 U.S. Dist LEXIS 12208, *46-47 (N.D. Cal. 1993).

5. “Materially Advance the Ultimate Termination of the Litigation.”

The last question is whether an immediate appeal “may materially advance the ultimate termination of the litigation.” 28 USC § 1292(b).

It should be self-evident that if an appeal is certified, and the Ninth Circuit concludes that the FCS family homes are not “institution[s] primarily engaged in the care of the sick, ... the mentally ill or defective” and are not subject to the FLSA, this case will be “materially advanced” – indeed, it will be completely terminated.

Alternatively, without an immediate appeal, this case will proceed to damages litigation over the amount of compensation owed to each of the six separate plaintiffs. This will entail examination of the employment records for each of the six plaintiffs over at least three different time periods for three different family homes. Wage calculations in FLSA cases are notorious for requiring painstaking efforts and vast time consumption, and this instance appears no different: the time claimed to have been worked by the various plaintiffs varies wildly, despite their having provided similar if not identical services to similar if not identical groups of children in similar if not identical family group home settings.

In a similar case, Rogers v. City of San Antonio, 2003 WL 1571550, 2003 U.S. Dist. LEXIS 4612, 172 L.R.R.M. 2249 (W.D. Tex. March 24, 2003), 392 F.3d 758 (5th Cir. 2004), the district court granted partial summary judgment for the plaintiff employees, finding the defendant employer liable under the Uniform Employment and Reemployment Rights Act. Rather than determining the amount of damages for each of the multiple employees, the court certified an immediate interlocutory appeal, finding that it could “hardly imagine a better case for certification”:

The Court can hardly imagine a better case for certification under section 1292(b). Both Orders required resolution of questions of first impression in the Fifth Circuit Court of Appeals ... These are novel issues on which there is dearth of case law and substantial grounds for differences of opinion.

Additionally, the interlocutory appeal of both the March 28, 2002 and March 4,

2003 Orders is warranted because it will materially advance the ultimate resolution of this litigation. Since the March 28, 2002 Order, the City has clearly stated its intention to appeal. In light of the limited case precedent and the unsettled state of the law, the Court finds it prudent, and indeed necessary, to allow the parties to proceed to the Fifth Circuit Court of Appeals for review at this time, before the parties expend additional resources preparing for a bench trial to determine the amount of damages due each of the fifteen separate plaintiffs.

If the interlocutory appeal is not accepted, the next stage of the proceedings before the trial court will involve determination of the damages due the fifteen plaintiffs. This will require exacting review of voluminous pay and leave records of these employees, going back to 1995. This review will require a tremendous number of hours to accomplish. If the liability ruling is ultimately overturned by the Fifth Circuit, it would obviate the need for a bench trial on the issue of damages altogether. If the appellate court adopts the defendant's argument and finds a two-year statute of limitations applicable to plaintiffs' claims, the pay and leave records to be examined will be fewer. The Fifth Circuit's review of these legal determinations now, as opposed to after submission of evidence concerning damages and painstaking examination of that evidence, will greatly benefit the parties and this Court.

Thus, the Court concludes that both the March 28, 2002 and March 4, 2003 summary judgment rulings "involve a controlling question of law to which there is a substantial ground for difference of opinion and that an immediate appeal from [these orders] may materially advance the ultimate termination of the litigation" 28 U.S.C. § 1292(b).

2008 WL 1571550, at *2-3. The 5th Circuit granted the subsequent interlocutory appeal. Rogers v. City of San Antonio, 392 F.3d 758 (5th Cir. 2004).

Similarly, in Frank v. McQuigg, 950 F.2d 590, 591, 594 (9th Cir. 1991), the District Court of Alaska certified and the Ninth Circuit accepted an interlocutory appeal of an order granting partial summary judgment to employees on FLSA coverage. See also Klem v. County of Santa Clara, 1998 WL 440425, at *7, 1998 U.S. Dist. LEXIS 22854, *2, 21-23 (N.D. Cal. July 9, 1998), 208 F.3d 1085, 1088-1089 (9th Cir. 2000) and Kouba v. Allstate Insurance, 523 F.Supp. 148, 164 (E.D. Cal. 1981), 691 F.2d 873 (9th Cir. 1982). The Ninth Circuit's District Courts have reasoned that in FLSA coverage cases:

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Rulings by the Ninth Circuit on these issues would materially advance the ultimate termination of this litigation. Depending on the Ninth Circuit's interlocutory rulings on the foregoing issues, the parties and the court may be spared the expensive and time consuming trial on damages which must follow if this Memorandum and Order stands. Alternatively, if this court's rulings stand, interlocutory rulings would provide much needed guidance in a decidedly muddled area of federal law. For these reasons, the court certifies the foregoing three issues for interlocutory appeal. 28 U.S.C. 1292(b).

Lucero v. Regents of the University of California, 1993 U.S. Dist. LEXIS 12208, *46-47 (N.D.

Cal. 1993):

For these same reasons, defendant has also demonstrated that the appeal will advance the ultimate termination of the litigation. The potential for bringing the litigation to a more expeditious close is related to the "controlling issue of law" factor for certification. See *id.* The court must consider the effect of a reversal by the court of appeals on the management of the case. *Id.* Here, a reversal of this court's Order could resolve this case in its entirety if defendant can present undisputed evidence that 90 percent of the water delivered was used for agricultural purposes. Further, even if a triable issue of fact is raised with respect to this element, the submission of this threshold issue to the jury will also advance the ultimate termination of the litigation.

As to the final requirement for certification of interlocutory appeal, the court acknowledged in its Order that there was a paucity of relevant case law on the applicability of the irrigation exemption. (Mem. & Order [Docket # 72] at 12-13). The court specifically noted that the only federal case to address the interpretation of § 213 after it was amended in 1997 is an unpublished decision from the Eastern District of California. See Avila v. Turlock Irrigation District, 2006 U.S. Dist. LEXIS 89750, 2006 WL 3437549 (E.D. Cal. Nov. 27, 2006). However, the court's Order did not adopt the interpretation of § 213 set forth in *Avila*. As such, there is now an intra-district conflict with respect to the interpretation of the irrigation exemption to the FLSA. Thus, the court finds that there is substantial ground for difference of opinion on the issue.

Watson v. Yolo County Flood Control, 2007 U.S. Dist. LEXIS 84934, *9 (E.D. Cal. 2007).

The Courts of Appeal in other Circuits have routinely accepted immediate appeals of partial summary judgment and summary judgment orders regarding FLSA coverage. Hopkins v. Cornerstone Am., 545 F.3d 338, 342-343 (5th Cir. 2008); Buckner v. Fla. Habilitation Network,

489 F.3d 1151, 1153, n. 1 (11th Cir. 2007); Belt v. Emcare, 444 F.3d 403, 406-407 (5th Cir. 2006); Thibodeaux v. Exec. Jet Int'l, 328 F.3d 742, 749 (5th Cir. 2003); United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1112 (10th Cir. 1999); Dade County v. Alvarez, 124 F.3d 1380, 1383 (11th Cir. 1997); Kohlheim v. Glynn County, 915 F.2d 1473, 1474 (11th Cir. 1990); Bester v. Chicago Transit Auth., 887 F.2d 118, 119 (7th Cir. 1989); Mineo v. Port Authority of New York & New Jersey, 779 F.2d 939, 940 (3rd Cir. 1985).

The Ninth Circuit's review of this Court's orders on FSLA coverage will similarly expedite the litigation. The final requirement for certification of an immediate appeal is thus present in this matter. Certification "may materially advance the ultimate termination of the litigation." 28 USC § 1292(b).

CONCLUSION

Family Centered Services must appeal this Court's orders on summary judgment, whether by an immediate appeal, if certified, or whether it is forced to wait until final judgment. FCS's only alternative is to abandon its children's family home program and to marshal its assets to pay a potentially crippling judgment.

There is no reason to wait. Immediate appeal will materially advance the ultimate termination of this litigation and expeditiously allow the Ninth Circuit Court of Appeals to provide much needed guidance in this uncertain area of law. Family Centered Services therefore respectfully requests that this Court certify its orders for an immediate appeal under 28 U.S.C. § 1292(b).

DATED at Fairbanks, Alaska, this 27th day of March 2009.

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing will be electronically served simultaneous with filing to the following attorneys and/or parties of record:

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/s/Lisa R. Miller 3/27/09
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