

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CATHERINE E. SULLIVAN,

No. C 08-3893 CW

Plaintiff,

ORDER DENYING  
DEFENDANT'S  
MOTION TO CERTIFY  
INTERLOCUTORY  
APPEAL

v.

KELLY SERVICES, INC. and DOES 1 TO  
10, inclusive,

Defendants.

\_\_\_\_\_ /  
Defendant Kelly Services, Inc. moves for an order certifying an interlocutory appeal of the question addressed in the Court's October 16, 2009 Summary Judgment Order: Does "California law require a temporary staffing agency to pay its employees for time and expense relating to interviews with a staffing agency's customer?" October 16, 2009 Order at 1. Plaintiff opposes the motion. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court denies Defendant's motion.

Pursuant to 28 U.S.C. § 1292(b), a district court may certify

1 an appeal of an interlocutory order only if three factors are  
2 present. First, the issue to be certified must involve a  
3 "controlling question of law." 28 U.S.C. § 1292(b). Establishing  
4 that a question of law is controlling requires a showing that the  
5 "resolution of the issue on appeal could materially affect the  
6 outcome of litigation in the district court." In re Cement  
7 Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982).

8 Second, there must be "substantial ground for difference of  
9 opinion" on the issue. 28 U.S.C. § 1292(b). A substantial ground  
10 for difference of opinion is not established by a party's strong  
11 disagreement with the court's ruling; the party seeking an appeal  
12 must make some greater showing. Mateo v. M/S Kiso, 805 F. Supp.  
13 792, 800 (N.D. Cal. 1992).

14 Third, it must be likely that an interlocutory appeal will  
15 "materially advance the ultimate termination of the litigation."  
16 28 U.S.C. § 1292(b); Mateo, 805 F. Supp. at 800. Whether an appeal  
17 may materially advance termination of the litigation is linked to  
18 whether an issue of law is "controlling" in that the court should  
19 consider the effect of a reversal on the management of the case.  
20 Id. In light of the legislative policy underlying § 1292, an  
21 interlocutory appeal should be certified only when doing so "would  
22 avoid protracted and expensive litigation." In re Cement, 673 F.2d  
23 at 1026; Mateo, 805 F. Supp. at 800. If, in contrast, an  
24 interlocutory appeal would delay resolution of the litigation, it  
25 should not be certified. Shurance v. Planning Control Int'l, Inc.,  
26 839 F.2d 1347, 1348 (9th Cir. 1988).

27 "Section 1292(b) is a departure from the normal rule that only  
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1 final judgments are appealable, and therefore must be construed  
2 narrowly." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068  
3 n.6 (9th Cir. 2002). Thus, the court should apply the statute's  
4 requirements strictly, and should grant a motion for certification  
5 only when exceptional circumstances warrant it. Coopers & Lybrand  
6 v. Livesay, 437 U.S. 463, 475 (1978). The party seeking  
7 certification of an interlocutory order has the burden of  
8 establishing the existence of such exceptional circumstances. Id.  
9 A court has substantial discretion in deciding whether to grant a  
10 party's motion for certification. Brown v. Oneonta, 916 F. Supp.  
11 176, 180 (N.D.N.Y. 1996) rev'd in part on other grounds, 106 F.3d  
12 1125 (2nd Cir. 1997).

13 Defendants argue that there are substantial differences of  
14 opinion on controlling questions of law regarding the issue they  
15 wish to appeal because it has not been directly addressed by the  
16 Ninth Circuit or any other court in the county. However, "the  
17 mere presence of a disputed issue that is a question of first  
18 impression, standing alone, is insufficient to demonstrate a  
19 substantial ground for difference of opinion under § 1292(b)." In  
20 re Conseco Life Ins. Cost Of Ins. Litig., 2005 WL 5678841, at \*7  
21 (C.D. Cal.) (citing Flor v. Bot Financial Corp., 79 F.3d 281, 284  
22 (2d Cir. 1996); see also Lenz v. Universal Music Group, 2008 WL  
23 4790669, at \*2 (N.D. Cal.). Similarly, "substantial ground for  
24 difference of opinion does not exist merely because there is a  
25 dearth of cases." S.A. v. Tulare County Office of Educ., 2009 WL  
26 331488, at \*6 (E.D. Cal.) (Citing White v. Nix, 43 F. 3d 374, 378  
27 (8th Cir. 1994).

1 Defendant argues that continuing the litigation will be time-  
2 consuming, expensive and a potential waste of judicial resources  
3 if, after trial, the Ninth Circuit disagrees with the Court's  
4 summary judgment ruling. Because Plaintiff asserts only one claim,  
5 an interlocutory appeal, if successful, would likely advance the  
6 ultimate termination of this litigation. This is true any time a  
7 case-dispositive motion is denied. However, if the appeal were to  
8 fail, the termination of the litigation would be delayed, and the  
9 Court of Appeals would be burdened with a second appeal.

10 Finally, there are no exceptional circumstances warranting  
11 interlocutory appeal. For the foregoing reasons, Defendant's  
12 motion for certification of an interlocutory appeal is denied.  
13 Docket No. 45.

14 IT IS SO ORDERED.

15 Dated: 04/07/10



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CLAUDIA WILKEN  
United States District Judge