



1 1292 provides,

2 When a district judge, in making in a civil action an order not otherwise appealable  
3 under this section, shall be of the opinion that such an order involves a controlling  
4 question of law to which there is substantial ground for difference of opinion and that  
5 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 . . . .

6 28 U.S.C. § 1292(b). Thus, a district court may certify an order for interlocutory appellate review  
7 under § 1292(b) where the following requirements are met: (1) there is a controlling question of  
8 law; (2) there are substantial grounds for difference of opinion; and (3) an immediate appeal may  
9 materially advance the ultimate termination of the litigation. *In re Cement Antitrust Litig.*, 673  
10 F.2d 1020, 1026 (9th Cir. 1982). “[T]he legislative history of 1292(b) indicates that this section  
11 was to be used only in exceptional situations in which allowing an interlocutory appeal would  
12 avoid protracted and expensive litigation.” *Id.* (citation omitted). The party seeking certification  
13 has the burden of showing that exceptional circumstances justify a departure from the “basic policy  
14 of postponing appellate review until after the entry of a final judgment.” *Coopers & Lybrand v.*  
15 *Livesay*, 437 U.S. 463, 475 (1978).

16 The court finds that Defendant has failed to identify exceptional circumstances warranting  
17 an interlocutory appeal here. Although the issue before the court involves a controlling question of  
18 law, the court is not convinced that the remaining two requirements are satisfied.

19 Defendant first argues that there are substantial grounds for difference of opinion because  
20 the Nevada Supreme Court has not recognized a public policy wrongful termination claim based on  
21 an employee’s exercise of short term disability benefits. In so arguing, Defendant essentially  
22 presents the same arguments that it previously asserted in support of its motion to dismiss.

23 While Defendant is correct that the issue was one of first impression, “the mere presence of  
24 a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate  
25 substantial ground for difference of opinion.” *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996).

1 Moreover, “[§] 1292 was not intended merely to provide review of difficult rulings in hard cases.”  
2 *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). The arguments Defendant presents  
3 in opposition to the court’s ruling do not suggest that the issue for appeal is truly an issue over  
4 which there is substantial ground for dispute. As the court explained in its previous order, in light  
5 of the lack of a statutory or other tort remedy available to Plaintiff and the Nevada Supreme Court’s  
6 recognition of the importance of protecting the interests of injured workers, the Nevada Supreme  
7 Court would likely find that terminating an employee for exercising his short term disability  
8 benefits is contrary to the public policy of the State of Nevada. While there may be differences of  
9 opinion on this issue, the court doubts that these differences are so substantial as to warrant  
10 immediate appellate review.

11 It is also not clear that an immediate appeal will materially advance the ultimate termination  
12 of the litigation. To determine whether an immediate appeal will materially advance the ultimate  
13 termination of the litigation, the court considers whether an appeal will “appreciably shorten the  
14 time, effort, or expense of conducting [the] lawsuit.” *See In re Cement Antitrust Litig.*, 673 F.2d at  
15 1027.

16 Defendant recognizes that, regardless of whether the court permits it to seek an  
17 interlocutory appeal, the remaining claims will go to trial before this court. Defendant contends,  
18 however, that only the state law wrongful termination claim will require a jury trial and that by  
19 permitting it to file an interlocutory appeal of the court’s state law ruling, the parties and court can  
20 avoid the “unnecessary time and expense” of a jury trial. Thus, Defendant argues, an immediate  
21 appeal will materially advance the litigation.

22 The court disagrees. Although there certainly are differences between a trial before a jury  
23 and a trial before a judge, these distinctions are not so substantial as to create the type of  
24 exceptional circumstances justifying an interlocutory appeal. Moreover, there is no assurance that  
25 the Ninth Circuit will accept Defendant’s appeal, and if the Ninth Circuit ruled against Defendant,  
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1 the case would be remanded to this court, causing further delay. In addition, the issue in dispute  
2 may be resolved expeditiously with limited discovery and a summary judgment motion. For these  
3 reasons, the court finds that an immediate appeal will not materially advance the termination of this  
4 litigation.

5 IT IS THEREFORE ORDERED that Defendant's "Motion to Amend September 25, 2009,  
6 Order" (#175) is DENIED.

7 IT IS FURTHER ORDERED that this case is referred to the Honorable Valerie P. Cooke  
8 for the purpose of establishing a discovery schedule for Plaintiff's Tenth Claim for Relief.<sup>2</sup>

9 IT IS FURTHER ORDERED that a pretrial order shall follow thirty (30) days after the  
10 established discovery deadline or a decision upon any dispositive motions concerning the Tenth  
11 Claim for Relief.

12 IT IS SO ORDERED.

13 DATED this 13<sup>th</sup> day of January, 2010.



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16 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup>The court rejects Plaintiff's argument that the court should not reopen discovery on the Tenth Claim for Relief. Although discovery has been closed for some time, when discovery was conducted, Plaintiff had not asserted a public policy wrongful termination claim based on Plaintiff's exercise of his short-term disability benefits.