

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALEJANDRO LOPEZ and
JACOB LAZARZ, on behalf of themselves
and others similarly situated,

Plaintiffs,

v.

SEARS, ROEBUCK & CO.,

Defendant.

ORDER

11-cv-728-bbc

In this proposed class action for monetary relief, plaintiffs Alejandro Lopez and Jacob Lazarz contend that defendant Sears, Roebuck & Co. violated Wis. Stat. § 103.455 by failing to pay commissions to its technicians for warranty work performed at defendant's auto centers. On December 1, 2012, defendant filed a motion for summary judgment on the claim, contending that its compensation policy did not violate the plain meaning and intent of the statute. I denied the motion on April 2, 2012, concluding "that defendant's compensation policy contravenes § 103.455 because it impermissibly shifts business losses to defendant's employees without giving them an opportunity to contest their liability for the losses." Dkt. #37 at 2.

Defendant has filed a motion for the court to amend the April 2 order to certify an interlocutory review under 28 U.S.C. § 1292(b) and to stay the case pending a decision from

the court of appeals. Defendant asks the court to certify the question whether “defendant’s policy of not paying auto technicians a commission for re-work necessitated by defective or faulty workmanship violates Wis. Stat. § 103.455?”

I am denying the motion. Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal if the order (1) “involves 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.” This type of appeal is discretionary and should “be used sparingly.” Asher v. Baxter International Inc., 505 F.3d 736, 741 (7th Cir. 2007).

Although defendant’s appeal would involve a controlling question of law, I am not persuaded that there is substantial ground for difference of opinion as to the question whether defendant’s compensation policy violates Wis. Stat. § 103.455. As I pointed out in the April 2 opinion, I found no cases in Wisconsin or otherwise that had applied § 103.455 or a similar state statute to a compensation system similar to defendant’s. In some situations, the lack of guiding precedent may mean that there is a “substantial ground for difference of opinion” on a question. In this case, however, it was clear from the facts of the case that defendant’s compensation scheme allowed defendant to pass on the costs of faulty or defective workmanship to technicians who may or may not be responsible for the problem and deprived technicians of commissions they otherwise would earn for similar tasks. Such a compensation system violates § 103.455. Defendant cited no cases at summary judgment or in support of its motion for a certificate of appealability that would support a different

conclusion.

Moreover, I am not persuaded that an appeal would “materially advance ultimate termination of the litigation.” The motions for class certification are due on June 15, 2012 and the trial is set for May 20, 2013, less than one year away. As defendant admits in its motion, the court has resolved the major legal issue in the case, and “the only issues to be resolved are class certification and the extent of Plaintiffs’ alleged damages (either individually or, potentially, on a class-wide basis).” Dft.’s Br., dkt. #41, at 4. Thus, the case may be resolved fully in this court before defendant could receive a ruling from the court of appeals.

ORDER

IT IS ORDERED that defendant Sears, Roebuck & Co.’s motion for certification and stay to file an interlocutory appeal, dkt. #40, is DENIED.

Entered this 29th day of May, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge